

**LAW AND UNDERWATER CULTURAL HERITAGE:  
A MALAYSIAN PERSPECTIVE**

**By**

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## **Dedication**

I dedicate this thesis to my late *Nenek* and *Mamakcik*. Love survives.

## Declaration

This thesis is the result of my own investigations except where otherwise stated. It has not been published and has not been submitted for a degree at another university.

.....  
Mahmud Zuhdi Mohd Nor

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## Abstract

The development of legal protection for underwater cultural heritage in Malaysia has been painfully slow. Although the realisation of the need to protect this endangered heritage from human interferences went as far back as the 1980s, it is the legal debates at UNESCO (1996-2001), which have had a profound effect on the status of maritime archaeology in Malaysia as seen today. The UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001 (2001 UNESCO Convention) was adopted to amplify the basic legal regime provided by the United Nations Convention on the Law of the Sea 1982 (1982 UNCLOS). Although many of the problems have been addressed with the adoption of the 2001 UNESCO Convention, certain issues remain unclear, compounded by the lack of support by certain major maritime States.

The objective of this thesis is two-fold. First, it seeks to examine the main features and substantive aspects of the 2001 UNESCO Convention and to make recommendations concerning Malaysia's ratification of the Convention. Secondly, this thesis will examine the present domestic legal framework protecting the underwater cultural heritage in Malaysia. Various international treaties, draft convention reports, legislation, cases, legal commentaries and other documents were studied for this purpose. This thesis also surveys the views of certain key government officials, archaeologists and private salvage companies in Malaysia.

The writing of this thesis is divided into six main chapters. Chapter I gives an account of the socio-economic and the legal antecedents leading to the adoption of the 2001 UNESCO Convention on 2<sup>nd</sup> November 2001. Chapter II explores the core issues underpinning the Convention from a Malaysian perspective, a country rich with potential for discovery of the underwater cultural heritage but still at its infancy in underwater maritime archaeology. This chapter is then followed by Chapter III, which looks at the organisational aspects of heritage management in Malaysia. Chapters IV and V examine the present legal framework in Malaysia affecting the protection of its underwater cultural heritage. Chapter VI concludes the thesis with findings and recommendations.

## List of Abbreviations

|                  |   |
|------------------|---|
| AA               | American Antiquity  |
| ACHWS            | Advisory Committee on Historic Wreck Sites                              |
| AIMA             | Australian Institute for Maritime Archaeology                           |
| AJIL             | American Journal of International Law                                   |
| Australian YBIL  | Australian Yearbook of International Law                                |
| BYIL             | British Yearbook of International Law                                   |
| CBD              | Convention on Biological Diversity                                      |
| CLJ              | Current Law Journal   |
| CMi              | Comité Maritime International   |
| DCMS             | Department of Culture, Media and Sport                                  |
| EC               | European Committee  |
| EEZ              | Exclusive Economic Zone   |
| EJIL             | European Journal of International Law                                   |
| Env Pol & Law    | Environmental Law and Policy  |
| EPU              | Economic Planning Unit  |
| Fordham Int'l LJ | Fordham International Law Journal                                       |
| ICJ              | International Court of Justice  |
| ICLQ             | International and Comparative Law Quarterly                             |
| ICOM             | International Council of Museums  |
| ICOMOS           | International Council for Monument and Sites                            |
| IJMCL            | International Journal of Marine and Coastal Law                         |
| IJNA             | International Journal of Nautical Archaeology                           |
| ILA              | International Law Association   |
| ILC              | International Law Commission  |
| ILM              | International Legal Material  |
| ILR              | International Law Reports   |
| IMO              | International Maritime Organisation                                     |
| ITLOS            | International Tribunal of the Law of the Sea                            |
| JEL              | Journal of Environmental Law  |
| JMLC             | Journal of Maritime Law and Commerce                                    |
| MARPOL           | 1973/78 Convention for the Protection of Marine Pollution<br>from Ships |
| Max Planck UNYB  | Max Planck Yearbook of United Nations Law                               |
| MIMA             | Maritime Institute of Malaysia  |
| MLJ              | Malayan Law Journal   |
| MOSTI            | Ministry of Science and Technology                                      |
| MSO              | Merchant Shipping Ordinance   |
| NYBL             | Netherlands Yearbook of International Law                               |
| ODIL             | Ocean Development and International Law                                 |

|                |  |
|----------------|--|
| PURBA          | Museum Journal Malaysia  |
| SAN DIEGO L. R | San Diego Law Review   |
| SJIL           | Singapore Journal of International Law                           |
| UN             | United Nations   |
| UNCLOS I       | First United Nations Conference on the Law of the Sea            |
| UNCLOS II      | Third United Nations Conference on the Law of the Sea            |
| UNCLOS         | United Nations Convention on the Law of the Sea                  |
| UNESCO         | United Nations Educational, Scientific and Cultural Organisation |
| UNGA           | United Nations General Assembly                                  |
| UNITAR         | United Nations Institute of Training and Research                |
| YBILC          | Yearbook of International Law Commission                         |

## **List of Treaties and Other Instruments**

Agreement between Australia and The Netherlands Concerning Old Dutch Shipwrecks 1972

Agreement between France and the United States on the CSS Alabama 1989

Agreement between the Government of Malaysia and the Government of Indonesia on the delimitation of the continental shelves between the two countries, 27 October 1969

Agreement between the Government of the Republic of Indonesia, The Government of Malaysia and the Government of the Kingdom of Thailand Relating to the Delimitation of the Continental Shelf Boundaries in the Northern Part of the Strait of Malacca, 21 December 1971

Agreement between the Republic of Estonia, the Republic of Finland, and the Kingdom of Sweden Regarding MS/Estonia 1995

Agreement between USA, Canada, France and UK on the RMS Titanic.

Agreement on Straddling Fish Stocks and Highly Migratory Fish Stock 1995.

ASEAN Declaration on the Protection of Cultural Heritage 2000.

Commonwealth Scheme on the Protection of the Material Cultural Heritage 1999.

Convention Concerning the Protection of the World Cultural and Natural Heritage 1972  
Convention on the Means of Prohibiting and Preventing Illicit Export, Import, Transfer of Cultural Property 1970.

Convention on the Protection of Cultural Property in the Event of Armed Conflict 1954  
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Revised Guidelines for the Identification and Designation of Particularly Sensitive Areas' adopted on 1 December 2005 adopted through IMO Resolution A.982(24) Doc. A.24/Res.982.

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Treaty between the Kingdom of Thailand and Malaysia relating to the delimitation of the territorial seas of the two countries, 24 October 1979.

Treaty between the Republic of Indonesia and Malaysia Relating to the delimitation of the Territorial Seas of the Two Countries in the Strait of Malacca, 17 March 1970.

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Continental Shelf Act 1966

Establishment of Marine Parks and Marine Reserves Order 1994

Exclusive Economic Zone Act 1984 (Act 311)

Federal Constitution (Act 000)

Fisheries (Closed Season for the Catching of Grouper Fries) Regulations 1996

Fisheries (Conservation and Culture of Cockles) Regulations 1964

Fisheries (Licensing of Local Fishing Vessels) Regulations 1985

Fisheries (Marine Culture System) Regulations 1990

Fisheries (Maritime) regulations (Sarawak) 1976

Fisheries (Maritime) Regulations 1967

Fisheries (Prohibition of Methods of Fishing) Regulations 1980

Fisheries Regulations 1964

Geological Survey Act 1972 (Act 129)

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Johore Treasure Trove No.28, 1956.

Kuala Lumpur (Planning) Act 1973



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Land Conservation Act 1960  
Library Submission Act No.33/1986  
Local Government Act 1976  
Malacca Preservation & Conservation of Cultural Heritage Enactment 1998  
Merchant Shipping Act 1894 (UK)  
Merchant Shipping Act 1995 (UK)  
Merchant Shipping Ordinance 1952  
Mineral Development Act 1994 (Act 525)  
National Archive Act 2003 (Act 629)  
National Forestry Act 1984 (Act 313) (Amendment 1993)  
National Forestry Policy 1978 (Amendment 1992)  
National Heritage Act 2005  
National Land Code 1960  
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The Blackwall [1869] 77 U.S. 1

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 The Sandefjord [1953] 2 Llyod's Rep. 557  
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### The Socio-Economic and Legal Impetus Leading to the Development of the 2001 UNESCO Convention on the Underwater Cultural Heritage

#### 1.1 Introduction

This chapter seeks to give a brief account of the competing socio-economic interests that underpin the development of a legal regime protecting underwater cultural heritage as a global concern and to state the legal antecedents leading to the adoption of the UNESCO Convention on the Protection of the Underwater Cultural Heritage in Paris on 2<sup>nd</sup> November 2001.<sup>1</sup> In so doing, this chapter outlines the inter-locking issues and challenges faced by the International community in formulating a more solid regime of protection for underwater cultural heritage. Despite the degree of efforts shown by the international community and particularly UNESCO in recent times to protect underwater cultural heritage – a major milestone being the adoption of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage - its transformation into a definitive regime of protection is wrought with uncertainty. With a number of international conventions already in existence dealing with cultural heritage protection, the 2001 Convention is a significant broadening of the range of international instruments in the field. Today, 20 States have ratified or accepted the Convention.<sup>2</sup> The Convention will come into force three months after the deposit of

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<sup>1</sup> The text of the Convention available at:

[http://portal.unesco.org/en/ev.php-URL\\_ID=13520&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13520&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited 25/01/2006).

<sup>2</sup> The States of Panama, Bulgaria, Croatia, Spain, Libyan Arab Jamahiriya, Nigeria, Lithuania, Mexico, Paraguay, Portugal, Ecuador, Ukraine, Lebanon, St Lucia, Romania, Cambodia, Cuba, Montenegro, Slovenia and most recently Barbados have so far ratified the Convention. Chronological order of the ratification status of the Convention is available at the following address:

20th ratifications<sup>3</sup> and so accordingly, as against those who have accepted or ratified it, it will come into force on 2 January 2009.<sup>4</sup> This is an encouraging development, however, compared to the other more recently adopted Conventions under the helm of UNESCO, it is frustrating to note that the 2001 Convention lacks speed in the ratification process.<sup>5</sup> Since the underwater cultural heritage is a finite and non-renewable cultural resource, a swifter and wider ratification or acceptance by States is necessary to ensure that the proposed legal mechanism can be enforced to protect vulnerable sites and objects of underwater cultural heritage before it is too late. The adoption of the UNESCO Convention in November 2001 after years of difficult negotiations is therefore far from being the definitive end to the pillage and destruction of underwater cultural heritage. It is submitted that until the new Convention becomes widely ratified, and until the objectives and the principles enshrined in article 2 of the Convention as well as the Annex Rules become widely accepted and practised by the international community, it remains uncertain whether this Convention could effectively achieve the desired goals.

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<http://portal.unesco.org/la/convention.asp?KO=13520&language=E> (last visited 2 October 2008).

<sup>3</sup> Art. 27 of the Convention provides that it will 'come into force three months from the date of the twentieth ratification' and 'solely with respect to the twenty States or territories that have so deposited their instruments' and as against other members, 'three months after the date on which that State or territory has deposited its instrument'.

<sup>4</sup> UNESCO Website info at: <http://portal.unesco.org/la/convention.asp?KO=13520&language=E> (last visited on 2 October 2008)

<sup>5</sup> More recent Conventions adopted at UNESCO which have already come into force are; the Convention on the Protection and Promotion on the Diversity of Cultural Expressions adopted in Paris on 20 October 2005 which has so far received 50 ratifications; the International Convention on Anti-Doping in Sports (19 October 2005) came into force on 1 February 2007 has so far received 47 ratifications; Convention for the safeguarding of Intangible Cultural Heritage 2003 came into force on 20 April 2006 and has so far received 75 ratifications.



## 1.2 The Socio-Economic Impetus for the Development of the New Regime Protecting the Underwater Cultural Heritage

### 1.2.1 Advancement in Deep Sea Salvage

It is not always the wonders of technological advancement in underwater archaeology and deep-sea salvage that brought us face to face with heritage beneath the waves. Sometimes, mankind stumbled upon it by accident,<sup>6</sup> and other times, an act of God brought mankind in touch with sunken ancient civilisation.<sup>7</sup> However, without doubt, it is the scale of technological advancement in deep-sea salvage, which has resulted in the need for specific rules and regulations pertaining to the protection and conservation of underwater cultural heritage. The reason is simply that technological advancement in deep-sea salvage, which is mostly associated with the recovery of sunken treasures, has allowed humankind to indulge in the hitherto impossible,<sup>8</sup> often leading unfortunately to the destruction such heritage.<sup>9</sup> Although the realisation of the need for specific rules and regulations pertaining to the protection and conservation of underwater cultural heritage is no longer an issue with the adoption of the UNESCO 2001 Convention, the question of the application of the Convention as well as other rules of international law relating to underwater cultural heritage is still a matter of great concern. In this sense, technological advancement in deep seabed recovery

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<sup>6</sup> Such as artefacts found during recreational wreck diving or artefacts found tangled on fishing net. See Chapter 5, para 5.7.2, pp. 220-227.

<sup>7</sup> In this case, the uncovering of ancient artefacts near the temple of *Mahabalipuram* near the Indian shore because of the Tsunami wrath on 26<sup>th</sup> December 2004 that wiped away hundreds of thousands of lives is a good example. The calamity also resulted in the destruction of underwater cultural heritage training site in Sri Lanka. News at [Globeandmail.com](http://www.theglobeandmail.com/servlet/story/RTGAM.20050317.wtsunami0317/BNStory/specialScienceandHealth) available at: <http://www.theglobeandmail.com/servlet/story/RTGAM.20050317.wtsunami0317/BNStory/specialScienceandHealth> (last visited 17 March 2005).

<sup>8</sup> Without technological advances, discoveries and recovery of well known historical wrecks lying in deep sea such as the Titanic, Central America (USA), the HMS Sussex (UK), Geldermahsen (Indonesia) and Diana (Malaysia) were simply not possible.

<sup>9</sup> UNGA Res 34/51 (18 January 2000) United Nations General Assembly, Oceans and the Law of the Sea.

activities has been and still is a step ahead of legal development<sup>10</sup> - it has opened ways for more enhanced and effective survey and recovery methods but at the same time has invited the ills of commercial exploitation and, in extremis, the very destruction of this finite heritage.

Prior to the historical development of the Geneva Conventions 1958, the move towards 'claiming sovereign rights over the continental shelf' was described as 'still in its infancy' so much so that the impact of future technological advancement in this area had apparently not been fully appreciated.<sup>11</sup> The invention of the 'aqualung',<sup>12</sup> which first made possible human access to the underwater world, occurred only in the 1940s, but access to the seabed was much more limited 'as the human body could only descend to a certain depth and for only a short period of time'.<sup>13</sup> Greater access to the deep in search of underwater cultural heritage became possible with the advent of remarkable inventions such as SCUBA (Self-contained Underwater Breathing Apparatus),<sup>14</sup> as well as sonar, remote-operated vehicles, underwater cameras and other submersibles.<sup>15</sup> The first systematic survey of the underwater cultural heritage in the United Kingdom was reportedly first carried out in the 1960s,<sup>16</sup> and the first historic

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<sup>10</sup> Just as the advancement in aircraft technology was a step ahead from legal development in International air law.

<sup>11</sup> E. Brown, 'Legal Loopholes', UNESCO SOURCES Vol. 87 / February 1997, p. 10.

<sup>12</sup> Aqualung was invented by Emile Gagnan & Jacques-Yves Cousteau (1942-43). See: Le Gurun, G., 'France', in Dromgoole, S., *The protection of the Underwater Cultural Heritage: National Perspectives in Light of the UNESCO Convention 2001*, p. 59.

<sup>13</sup> Mather, R., 'Technology and the Search for Shipwrecks', 30 J. Mar. L & Commerce (1999) 175.

<sup>14</sup> When SCUBA was invented in 1943, it only 'had the limit of 45m'. See; Council of Europe, 'Maritime and Fluvial Cultural Heritage', 2000, para 3.4.3; UNESCO Doc. 146 EX27. (1995) 'Feasibility Study for the Drafting of a New Instrument for the Protection of the Underwater Cultural Heritage', paragraph 7, and, Bederman, 'Historic Salvage and the Law of the Sea', (1998) 30 MIAMI INTER-AM L. REV, p. 102.

<sup>15</sup> E. Brown, above, note 10.

<sup>16</sup> Mulkeroy, K., *Maritime Archaeology*, New Studies in Archaeology, Cambridge University Press, Cambridge, 1995, p. vii.

wreck site was identified in the UK waters only in 1965.<sup>17</sup> In Malaysia, the first discovery was made only in the early 1980s by fisherman and by accident.<sup>18</sup> Developments such as these occurred much later than the legal development in Geneva of the law of the sea, but within just a short period since then, they have opened up the doors to the treasures of the underwater realm for all humankind.

### **1.2.2 The Recognition of the Problem in Southeast Asia**

In the context of cultural heritage business, Malaysia is neither a 'source' nation, comparable to Indonesia or Cambodia, nor a centre of international art and culture, comparable to London, Paris or New York. Malaysia is also free from allegations of being a transit point and distribution centre, responsible for the movement of looted cultural property, such as that faced by the neighbouring Singapore in recent times.<sup>19</sup> Nevertheless, Malaysia's cultural heritage is significant, indeed unique, in that it represents a melting pot between the east and west, containing among other things, evidence of ancient maritime trade in the country.<sup>20</sup> One of the earliest efforts by UNESCO to heighten a sense of responsibility by the governments in the region was a seminar in 1986 which culminated in a warning to the international community that 'if positive steps are not taken immediately it is anticipated that the recent advances that have been made by treasure hunters internationally but particularly in the Southeast Asia will result in the tragic loss of essential and important heritage.'<sup>21</sup> More recently in Hanoi, the seriousness of the problem relating to cultural heritage protection in the

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<sup>17</sup> Ibid.

<sup>18</sup> See further; Chapter 5, para 5.7.2, p. 224.

<sup>19</sup> Jonathan Napack, 'Java's Art is Slipping Away: Looters Hit Majapahit Kingdom', *The Art Newspaper* (April 2002) p. 6, reported that in 'Singapore which imposes no controls on art sales... in recent years, magnificent sculptures smuggled from East Java have surfaced at Tanglin Mall, the center of the semi-licit trade in Indonesian cultural property.' The news also available at:

<http://www.forbes.com/2002/04/03/0403hot.html> (last visited on 14 March 2007).

<sup>20</sup> On the historical aspect of Malacca's ancient maritime trade, see Chapter 4, pp. 112-115.

<sup>21</sup> UNESCO Regional Seminar on the Protection of Moveable Cultural Property held in Brisbane, Australia, 2-5 December 1986.

region drove ICOM to organise a special workshop on the subject.<sup>22</sup> The main objective of this workshop was among others 'to establish a new approach to the protection of cultural heritage in Southeast Asia by increasing regional cooperation, and developing new strategies to sensitise decision makers, police and custom, local populations and the general public world-wide.'<sup>23</sup> Unfortunately, the coverage for the conference was a little too wide in scope so that issues relating specifically to the underwater cultural heritage protection received limited attention. Nevertheless, the workshop's recommendations revolved around three significant themes:

- a) *Protection of artefacts and monuments and sites and collections in museums and temples.* Here, the working group recognised that there is a 'need to integrate cultural heritage preservation within a wider framework of sustainable development involving living cultural systems, economic advancement and the participation of local communities.'<sup>24</sup> Recognised areas of concern include current legislation and enforcement frameworks, public awareness campaigns, training of relevant authorities (for example; customs and cultural heritage departments), update on heritage inventories, as well as a special attention to the preservation of the underwater cultural heritage 'through the development of adequate legislation frameworks and the training of personnel.'<sup>25</sup>
- b) *Customs, police and national coordination.* The working group recommended coordination between ICOM and other organisations (example; Interpol, WCO and ASEAN-COCI) for the purpose of 'implementation of Object ID' amongst ASEAN members and to promote the circulation of 'information about stolen

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<sup>22</sup> Asia Pacific Organisation of ICOM (ASPAC) in partnership with the Vietnam Ministry of Culture and Information (MoCI), 'Workshop on the Protection of Cultural Heritage in Southeast Asia', 9-13 April 2001, Hanoi, Vietnam. Visit <http://www.icom.museum/hanoi.html> (last visited on 6 May 2004).

<sup>23</sup> Ibid.

<sup>24</sup> Working Group 1 Recommendations, Workshop on the Protection of Cultural Heritage in Southeast Asia 2001, at <http://icom.museum/theme1.html> (last visited on 6 May 2004).

<sup>25</sup> Ibid.

cultural artefacts' and the workshop recognised that these steps require support from ICOM for 'the training of customs, police and museum officers in ASEAN based on the needs of each country.'<sup>26</sup>

- c) *Capacity building towards sustainable heritage protection.* This includes training, networking and cooperation, public awareness and education in the area of cultural heritage protection as well as the development of documentation tools and inventory methods.<sup>27</sup>

In addition, on a more specific focus on the underwater cultural heritage, UNESCO's regional office organised a closed workshop in Hong Kong in November 2003 for the purpose of promoting the ratification of the 2001 Convention by member States by bringing together the leading authorities on the underwater cultural heritage.<sup>28</sup> Its action plans include the creation of 'an informal network to facilitate the exchange of information on legislation', encouraging member states to adopt the Annex Rules to the 2001 Convention, build awareness amongst the public as well as the proposed creation of underwater cultural heritage training site in Galle, Sri Lanka.<sup>29</sup> As a follow up to the Hong Kong workshop, an expert meeting took place on 9-11 April 2007 in Galle, Sri Lanka 'to provide platform for policy makers, legal experts and professional archaeologists to discuss and formulate practical roadmaps' towards ratifying the 2001 UNESCO Convention and 'mainstreaming the Rules of the Annex to the Convention

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<sup>26</sup> Working Group 2 Recommendations, Workshop for the Protection of Cultural Heritage in Southeast Asia 2001, at <http://icom.museum/theme2.html> (last visited on 6 May 2004).

<sup>27</sup> Working Group 3 Recommendations, Workshop for the Protection of Cultural Heritage in Southeast Asia 2001, at <http://icom.museum/theme3.html> (last visited on 6 May 2004).

<sup>28</sup> Visit <http://www.unescobkk.org/culture/underwater/detail.asp?id=3>.

<sup>29</sup> A full 'action plan' of the workshop is accessible online at <http://www.unescobkk.org/index.php?id=1105> (last visited on 13 March 2007).

into national policies.<sup>30</sup> Today, Malaysia is yet to announce its readiness to ratify the Convention.<sup>31</sup>

### 1.2.3 Use, User and Abuser: The Debate

Underwater cultural heritage lures human beings into the underwater world for various reasons, hence the number of groups of communities the world over who are interested in its discovery, preservation or exploitation. In the case of the discovery of historic wrecks, these groups could range from the readily identifiable owners of sunken vessels, underwater marine archaeologists, commercial salvors, leisure divers, antique and artefact collectors, auctioneers and, of course, the coastal State in whose territory the heritage is located or even States with verifiable interest.<sup>32</sup> Beyond national jurisdiction, the interest groups are mainly the flag state of the vessel, which undertook the recovery operations, the State of its 'historical' or 'cultural' origin as well as the international community as a whole.<sup>33</sup> However, across these interests, one issue seems to dominate the others, that is, the implications of the booming treasure hunting industry and its conflict with what might be termed 'archaeological dogma' behind the discovery of historic wrecks.<sup>34</sup>

Treasure hunting can be a lucrative business endeavour but the underwater cultural heritage is also an invaluable cultural resource for it contains a store of historical and

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<sup>30</sup> For further information, see; <http://www.unescobkk.org/index.php?id=5618> (last visited 13 March 2007).

<sup>31</sup> See chapter 2, para 2.2.1., pp. 46-50.

<sup>32</sup> These various interests are now recognised by the international community as stated in the Preamble to the 2001 UNESCO Convention 2001 that '...cooperation among States, international organisations, scientific institutions, professional organisations, archaeologists, divers, other interested parties and the public at large is essential....'.

<sup>33</sup> The 2001 Convention recognises the mankind in general as the beneficiary of the heritage, see further; chapter 2, and; J. Ashley Roach, 'Sunken Warship and Aircraft', *MARINE POLICY*, Vol. 20 No. 4 1996, p 352 note 4.

<sup>34</sup> Historic wrecks and underwater cultural heritage may at times be used roughly in the same sense since in the case of treasure hunting it is often associated with recovery of sunken historic wrecks and not of sunken historic ports or other monuments.

other vital information concerning past civilisations. According to Carman, 'preservation of items in an unchanged state and without public access makes them potentially available for scientific study'.<sup>35</sup> The value of scientific study of the historic wrecks - a major form of the underwater cultural heritage - has been much praised by the archaeology community. A study on trade items discovered on a number of historic wrecks in Southeast Asian waters conducted by Roxanna Brown proves how scientific analysis of discovered underwater cultural heritage could even put some established historical facts into question.<sup>36</sup> Often described as a 'time capsule' by the archaeologists, shipwrecks yield vast data on old ships and their cargoes that could not otherwise be obtained from other sources.<sup>37</sup> According to Brown, historic wrecks and cargoes found in the Straits of Malacca could be indicators of trade items available at the time of the last voyage, as merchants would have selected products appropriate to the route and its commercial criteria and they can also offer undisputable proof of certain technological advancements of the period.<sup>38</sup> Consequently, the floating of objects of underwater cultural heritage in the open market 'free of their documented context' could only result in the 'irreparable loss to science and history'.<sup>39</sup>

The case against the treasure hunting is that, often, the treasures and their associated environment would be damaged or destroyed forever due to improper and destructive recovery methods, although, to be fair, one must also recognise that historic wrecks can also be damaged by other factors such as natural disaster or destructive fishing

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<sup>35</sup> John Carman, *Valuing Ancient Things: Archaeology and Law*, Leicester University Press, 1996, London, p. 114.

<sup>36</sup> Roxanna Brown, "The Ming gap: What do the shipwrecks say?" June 2002, Public Lecture at the Antiquities and Museum Department, Kuala Lumpur, Malaysia.

<sup>37</sup> Roxanna Brown and Sten Sjostrand, *Maritime Archaeology and Shipwreck Ceramic in Malaysia*, Malaysian Maritime Archaeology by the Department of Museum and Antiquities, Kuala Lumpur, Malaysia. 2002.

<sup>38</sup> Ibid. Also, see Maritime Asia web info at; [www.maritimeasia.ws/exhib01/pages/p019.html](http://www.maritimeasia.ws/exhib01/pages/p019.html) and <http://www.maritimeasia.ws/exhib01/pages/p020.html> (last visited 13 March 2007).

<sup>39</sup> Lyndel Prott, 'Opening Note: Cultural Heritage Looted From Iraq', in *Resolution of Cultural Heritage Dispute* 2003, The Hague.



implements or techniques.<sup>40</sup> However, critiques of the treasure hunting industry argue that treasure hunters are often pressured to work within a specified time period, often resorting to destructive methods and forsaking the less commercially attractive objects and their associated environment as a collective value. At the heart of the critics' argument, is the assertion that the treasure hunters neither cared for nor were trained with archaeological values and principles. Consider the following arguments against looters and treasure hunters;<sup>41</sup>

Once a site has been worked over by looters in order to remove a few saleable objects, the fragile fabric of its history is largely destroyed. Changes in soil colour, the traces of ancient floors and fires, the imprint of vanished textiles and foodstuffs, the relation between one object and another, and the position of a skeleton – all of these sources of fugitive information are ignored and obliterated by archaeological looters.<sup>42</sup>

Paolo Monteiro, a marine archaeologist from the Angra Do Heroismo Museum in Terceira argued that archaeology and treasure hunting do not mix for the reason that;

Treasure hunting is driven by commercial logic; time is money, so they have to work quickly to raise as many artefacts as possible and sell them. An archaeologist can spend 10 years or more studying and excavating a ship, conserving its objects and publishing findings. We gain an enormous amount of information and knowledge from this work. With treasure hunters, all of this is lost; records are not kept and artefacts are spread all around the world in private collections.<sup>43</sup>

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<sup>40</sup> Beltrame, 'Report on the First Research Campaign on the Napoleonic Brick, Mercure, Wrecked off Lignano, Udine, Italy in 1812', 31 *IJNA* (2002) 60-73. Dr. Beltrame speaking on the North Italian Adriatic observed that; 'the plots of the side-scan sonar show clear traces of the furrows left on the sea floor both by 'rapidi' and by 'turbosoffianti'. Both types of fishing implements have a devastating impact upon submarine archaeological deposits, causing damage and dislodging.'

<sup>41</sup> Although this does not say that treasure hunters are necessarily looters.

<sup>42</sup> Clemency Coggins, 'Archaeology and the Art Market', 175 *Science* (1972) 263.

<sup>43</sup> Sue Williams, 'A treasure trove to protect', *UNESCO Sources*, No. 84 (1997), p. 7. Also available at: <http://www.abc.se/~m10354/publ/heritage.htm> (last visited 1 June 2004).



Reports of the recovery of artefacts from the *HMS Sussex*, the *Titanic*, as well as the recent legal battle between the government of Spain and the salvor of the alleged treasures from *Merchant Royal* in June 2007 explain the degree of economic motivation and of States' national interests in the matter.<sup>44</sup> In 1986, it was reported that Christie's managed to raise USD\$16 million, from the sale of 3,786 lots of Chinese porcelain and gold ingots from the famous *Nanking Cargo* which was salvaged from the Dutch flagged *Geldermahlsen*.<sup>45</sup> However, the auction was soon terminated possibly due to the controversy, which ensued thereafter. Christie's claimed that the auction only involved 'material recovered legally or under license from historical shipwrecks.'<sup>46</sup> Recovered artefacts from the wreck of the *Diana* also ended up in auction house. Although some of the recovered artefacts are now on display at the Maritime Museum in Kuala Lumpur, one is curious as to what went on in the highly confidential dispute between the government and salvor over the alleged distribution of artefacts.<sup>47</sup> Thus, in order to safeguard certain legitimate economic interests, salvors and treasure hunters argued that cultural artefacts with 'little economic value' but 'high cultural value' should be treated differently to those which are of 'high economic value' but of 'low cultural value'.<sup>48</sup> However, commercial salvors and governments' partnership in highly commercial recovery projects continued to be heavily criticised today.<sup>49</sup> In the publicised destruction to the wreck of the *Geldermahlsen* and its site, experts noted that 'almost nothing was recorded... and no proper conservation work was done on the

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<sup>44</sup> See further; Ch. 2, para 2.5.3, pp. 96-100.

<sup>45</sup> Internet sources available at: <http://www.abc.se/~m10354/publ/heritage.htm>. The matter also appears in UNESCO Courier, June 2000: available online at: <http://www.unesco.org/courier>.

<sup>46</sup> Sue Williams at UNESCO SOURCES No. 87 February 1997 p. 8.

<sup>47</sup> See; Ch. 3, p. 138 and Ch. 5, pp. 251-252.

<sup>48</sup> P. Fletcher-Tomenius, C. Forrest, "Historic Wrecks in International Waters", MARINE POLICY, 24 (2001), p. 3.

<sup>49</sup> See for instance Council of British Archaeology comments on UK's position of HMS Sussex, available at <http://www.britarch.ac.uk/conserv/sussexpr.html> (last visited 1 June 2007) and Dromgoole, S., 'Murky waters for government policy: the case of a 17<sup>th</sup> century British Warship and 10 tonnes of gold coins', MARINE POLICY (2004), p. 189-198.

objects raised.<sup>50</sup> Such criticism levelled singularly against treasure hunters and commercial salvage companies seems unfair since the auction houses as well as other parties who act as buyers (such as museums and private collectors who took part in bidding) also contributed to the booming of treasure hunting at sea. One such justification offered for the dubious involvement of reputable institutions like museum departments when acquiring coveted cultural objects in auctions is: 'museums face too many awkward decisions when fabulous treasure turns up their doors'.<sup>51</sup> In other words, rather than let these objects into the unknown, they would rather seize the opportunity to acquire, study and safeguard the items. Museums, some argue, 'can't afford to take an all-or-nothing position'.<sup>52</sup>

Even a pure quest for historical knowledge may not necessarily be an interest supported by a third interest group - family members of a shipwreck tragedy. Edward Kamuda, the founder of the Titanic Historical Society, concerned over the disturbance of The Titanic wreck and that the human remains should be left undisturbed argued that '... the materials being recovered are too recent to be of any archaeological value. They are nothing but curiosities and putting them on display is nothing but exploitation of one of the world's great tragedies'.<sup>53</sup> Similarly, in the case of state vessels sunken in the course of war where it is argued that the crew remains should be given the proper respect as ocean grave.<sup>54</sup>

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<sup>50</sup> Patrick, J. O'Keefe, *supra* note 14, 8.

<sup>51</sup> The Associated Press. November 29, 1998. Available online at: <http://www.post-gazette.com/healthscience/19981129wrecks2.asp>.

<sup>52</sup> John Carter of the Philadelphia's Independent Seaport Museum, *ibid*.

<sup>53</sup> Mike Toner, 'Science watch the salvage operation finders keepers?' *ATL. J. & ATL. CONST.*, March 30, 1997.

<sup>54</sup> J. Ashley Roach, *Sunken Warship and Military Aircraft*, 1996, p. 352. See also: Dromgoole and Gaskell, *Who Has a Right to Historic Wrecks and Wreckage?*, 1993, 2 *INT'L J. CULTURAL PROPERTY*, pp. 217, 230-231.

The point being, if one embraces the 'mutuality of interests' in order to reconcile the prevailing conflicts of interests,<sup>55</sup> one must consider further how this can be translated into a workable solution, avoiding loss in the long run. It would seem that under the 2001 UNESCO Convention, while recognising the various competing interests, the Convention does not totally ban recovery activities.<sup>56</sup> Such development has influenced the contents of current domestic legislation in Malaysia mainly through the National Heritage Act 2005. However, whether the principles and objectives of the Convention can ever be translated into a workable practice remain to be seen. The American Institute of Archaeology for instance is in support of 'multiple use management so long as it does not include private sector commercial recovery that is inconsistent with basic tenets' enunciated in the ICOMOS Charter.<sup>57</sup> The UNESCO, in support of the economic enjoyment of the underwater cultural heritage reported that the excavation of the underwater cultural heritage in Bodrum, Turkey 'led to the tripling of the area's population, and it becoming one of the most visited places in Turkey', while the excavation of the *Wasa* wreck, the most popular tourist site in Stockholm which 'brings in US\$300 per tourist per day to the Swedish economy' and the Western Australian Maritime Museum attracted some '250000 visitors per annum (70% of visitors coming from outside of the State of Western Australia) brings an estimated Australian \$26.5 million per annum to Western Australia for an annual investment by the Government of Australian \$1.2 million.'<sup>58</sup> By way of comparison, the report noted that 'the commercial recovery from the *Geldermahlsen* wreck, which had led to the destruction of the wreck, raised US\$16 million at the auction [but] had this China been placed in local

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<sup>55</sup> NATIONAL GEOGRAPHIC, May 1999, p. 1.

<sup>56</sup> See; Ch. 2, para 2.5.4, pp. 100-102.

<sup>57</sup> 'Comments by the Archaeological Institute of America on the UNESCO Convention on the Protection of the Underwater Cultural Heritage', 7 INT'L J. CULTURAL PROP. (1998) 543.

<sup>58</sup> UNESCO, 'Report by the Director General on Action Taken Concerning the Desirability of an International Instrument on the Underwater Cultural Heritage', UNESCO Doc. 29 C/22, p. 10, para. 59.

museum, this cultural heritage could have raised at least US\$16 million annually in perpetuity for the local community.<sup>59</sup>

### **1.3 International Regime for the Protection of Cultural Heritage**

#### **1.3.1 International Instruments on Cultural Heritage Protection Relevant to the Underwater Cultural Heritage**

Once recovered and removed from its underwater environment, the underwater cultural heritage assumes all the problems associated with the movement of terrestrial cultural heritage. Problems such as theft, illegal trade and trafficking in antiquities eventually result in the irretrievable dispersal of the heritage. These problems are the concerns of both the 'source' countries and 'market' countries.<sup>60</sup> To address these issues, there were already in existence a number of international as well as regional conventions aimed at the protection of cultural heritage prior to the adoption of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage. They include the following;

- a) The Convention on the Protection of Cultural Property in the Event of Armed Conflict (1954)
- b) The UNESCO Recommendation on International Principles Applicable to Archaeological Excavations 1956
- c) The Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, Transfer of Ownership of Cultural Property (1970)
- d) The Convention on the Protection of the World Cultural and Natural Heritage (1972)
- e) The UNESCO Recommendation Concerning the International Exchange of Cultural Property (1976)

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<sup>59</sup> Ibid.

<sup>60</sup> Other references to 'source' country would include 'artefacts-rich nations', 'nations of origin' and 'supply nations', while references to 'market' country include 'purchaser nations', 'artefacts-poor nations' or 'demand nations'. On these, see; Borodkin, L. J., 'The Economics of Antiquities Looting and a Proposed Legal Alternative', COLUMBIA L. R., 1995, 377-417, 385.

f) The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995)

The 1954 Hague Convention is the earliest international convention on cultural property in modern times and Malaysia was not yet an independent sovereign when it was adopted by the international community. The 1954 Hague Convention actually deals with protection of cultural properties that are exposed to the risk of destruction during the times of war and is applied only to cultural properties that are of particular significance 'thereby limiting its application to what is important rather than to what is of value' and in order to ensure 'multiplicity of protected sites would not undermine the protection regime and incur the "military necessity" exception on numerous occasions.'<sup>61</sup> A protocol for the Convention which was adopted in the same year dealt with other issues not covered by the Hague Convention 1954, i.e. the prevention of exportation of cultural properties from occupied territories to other territories. The 1970 UNESCO Convention, on the other hand, deals with the illicitly excavated and transfer of cultural heritage with an extensive list of categories which are of particular significance to a member States. It would seem that the solution to problems relating to illicit movement of cultural property in peaceful times requires States to ratify and implement the 1970 UNESCO Convention as well as its reciprocal 1995 UNIDROIT Convention on the Theft or Illegal Export of Cultural Goods. Enforcement can be enhanced through States' cooperation in a 'bilateral or multilateral agreement', establishing 'regional cooperation networks' and by 'increasing collaboration with INTERPOL (International Criminal Police Organization), ICOM (International Council of Museums) and WCO (World Customs Organization)' as well as 'devising specialized private databases to track stolen cultural property.'<sup>62</sup>

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<sup>61</sup> Craig, J.S. Forrest, 'Defining the Underwater Cultural Heritage', 31 *IJNA* (2002) 4.

<sup>62</sup> UNESCO website information at: [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=1534&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=1534&URL_DO=DO_TOPIC&URL_SECTION=201.html) (UNESCO, undated website information, last visited 16 December 2006).

In general, however, although some of these international agreements apply to underwater cultural heritage, they do not adequately provide the necessary protection due to the limits of jurisdiction provided. In addition, they do not address 'problems specifically related to marine archaeology, such as conflicts between salvage law and heritage legislation, the extent and scope of coastal jurisdiction over underwater cultural property, the enforcement at sea of heritage legislation and, most importantly, the protection of cultural property found in international waters.'<sup>63</sup> These inadequacies, according to Strati, are due to the limited application of the laws to only 'certain aspects of archaeological issue' and they are exclusively concerned only 'with problems which are common to' land-based cultural property. Consequently, it is 'absurd to expect a convention dealing with specific aspect of archaeological heritage' to also deal with problems associated with underwater cultural heritage which has only in recent times became accessible through advances in deep sea underwater technology.<sup>64</sup> The UNESCO Recommendation on International Principles Applicable to Archaeological Excavations 1956, applies to 'movable and immovable objects of archaeological interest'<sup>65</sup> and contains some rules relating to the licensing of excavations, conservation of finds, public education, reception of foreign excavators on national territory, assignment of finds, rights and obligations of the excavators, documentation as well as control of legal trade, clandestine excavation and illicit traffic of the heritage objects. As such, the Recommendation is useful for the development of law on underwater cultural heritage but its application over underwater findings, however, is limited to

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<sup>63</sup> Anastasia Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea*, 1995, p. 91.

<sup>64</sup> Ibid. In fact, as will be shown in subsequent Chapter 4, it is equally absurd to hold expect national laws which were drafted mainly for the purpose of the protection of terrestrial and built cultural heritage to also cater for the protection of the underwater cultural heritage.

<sup>65</sup> UNESCO Doc. 146 EX/27 p. 7 paragraph 39-40.

excavations on the bed or in the sub-soil of inland or territorial waters of a coastal state.<sup>66</sup>

### 1.3.2 Regional Instruments on Cultural Heritage Protection Relevant to the Underwater Cultural Heritage

Europe is comparably more advanced than other regions in the world in the development of cultural heritage protection. This is evident through the development of the European Cultural Convention (1954), European Convention on the Protection of the Archaeological Heritage (1969) as well as European Convention on the Protection of the Archaeological Heritage (Revised) (1992). The European Convention on the Underwater Cultural Heritage 1984, however, was not adopted due to some disagreements amongst several member States, but its impact is well recognised and widely commented upon by scholars in the field.<sup>67</sup> In the Southeast Asian region,<sup>68</sup> particular regard must be made to the adoption of the ASEAN Declaration on Cultural Heritage, which was adopted in Bangkok in the year 2000. This Declaration, although non-binding in nature, admirably attempts to comprehensively define the term 'cultural heritage'. Culture is defined under the Declaration as 'the whole complex of distinctive spiritual, intellectual, emotional and material features that characterise a society or social group' including 'the art and letters as well as human modes of life, value systems, creativity, knowledge systems, traditions and beliefs.'<sup>69</sup> Cultural heritage, meanwhile, is defined as:

- a. Significant cultural values and concepts

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<sup>66</sup> Strati, above, note 62.

<sup>67</sup> Anastasia Strati, 'Deep seabed cultural property and the common heritage of mankind' (1991) ICLQ, p. 859, 862; Blake, J., 'The protection of the underwater cultural heritage', (1996) ICLQ, p. 824-826.

<sup>68</sup> The Association of Southeast Asian Countries was founded on 8/8/1978 and the founding members are Indonesia, Philippines, Thailand, Brunei and Malaysia. See generally, <http://www.asean.org>.

<sup>69</sup> Framework Policy No. (1), ASEAN Declaration 2000.



- b. Structures and artefacts: dwellings, buildings for worship, utility structures, works of visual arts, tools and implements that are of a historical, aesthetic, or scientific significance
- c. Sites and human habitats: human creations or combined human creations and nature, archaeological sites and sites of living human communities that are of outstanding values from a historical, aesthetic, anthropological or ecological viewpoint, or, because of its natural features, of considerable importance, as habitat for the cultural survival and identity of particular living traditions;
- d. Oral or folk heritage: folkways, folklore, language and literature, traditional arts and crafts, architecture, and the performing arts, games, indigenous systems and practices, myths, customs and beliefs, rituals and other living traditions,
- e. The written heritage
- f. Popular cultural heritage: popular creativity in mass cultures (i.e. industrial or commercial cultures), popular forms of expression of outstanding aesthetic, anthropological and sociological values, including the music, dance, graphic arts, fashion, games and sports, industrial design, cinema, television, music video, video arts and cyber arts in technologically-oriented urbanized communities.

The definition of cultural heritage above is erudite and it combines both the tangible and the intangible aspect of cultural heritage protection. The expression 'cultural values and concepts' lends a vague sense of scope, albeit extensive, as they are not further defined under the Declaration. The inclusion 'oral folk heritage', 'written heritage' as well as 'popular cultural heritage' is a marked departure from the interpretation of cultural heritage as adopted in the UNESCO's Convention Concerning the Protection of World Cultural and Natural Heritage 1972. As far as underwater cultural heritage is concerned, significant provisions are those listed in paragraph (b) and (c), being part of the tangible heritage. The Declaration recognises the importance of regional cooperation in protecting 'antiquities and works of historic significance, movable and immovable cultural properties that are manifestations of national history, of great structural and architectural importance, of outstanding archaeological, anthropological and scientific value, or associated with exceptional events and are to be considered or



declared National Treasures and Protected Buildings or protected Artefacts. Historic Sites, cultural landscapes, areas of scenic beauty and natural monuments shall be identified, recognised and protected.<sup>70</sup>

The main strength of this declaration probably lies in provision 10 which calls for a regional approach in protecting ASEAN cultural heritage. However, today, no formal agreement has been entered into by governments in areas involving the recovery of the underwater cultural heritage. The Declaration also provides that, ASEAN 'shall exert the utmost effort to protect cultural property against theft, illicit trade and trafficking and illegal transfer.' This, in essence, demands cooperation from the members 'to return, seek to return or help facilitate the return, to their rightful owners of cultural property that has been stolen from a museum, site or similar repositories, whether the stolen property is presently in the possession of another member or non member country.'<sup>71</sup> In addition to that, the 'ASEAN member Countries are encouraged to take measures to control the acquisition of illicitly traded cultural objects by persons and/or institutions in their respective jurisdictions.'<sup>72</sup> This cooperation extends towards assisting 'other member or non member countries having serious problems in protecting their heritage by properly educating the public and applying appropriate and effective import and export control.'<sup>73</sup> In this respect, this Declaration is rather inclusive in its application. This is particularly significant since underwater cultural heritage is removable and can be traded in the open market.

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<sup>70</sup> Article 2 of the ASEAN Declaration on Cultural Heritage 2000.

<sup>71</sup> Article 10, ASEAN Declaration of Cultural Heritage 2000.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

## 1.4 Protection of Underwater Cultural Heritage as a Maritime Issue

### 1.4.1 Ocean Resource and Marine Policy in Malaysia

Geographically, Malaysia has a landmass of about 328,550 square kilometres and almost two thirds of the country is surrounded by ocean. Its coastline measures around 1,900 nautical miles or approximately 4,674 kilometres.<sup>74</sup> Malaysia has entered into several delimitation agreements with other ASEAN members as a result of the implementation of UNCLOS 1982, which it ratified on 14 October 1996. The government also acceded to all of the 1958 Geneva Conventions soon after independence.<sup>75</sup> The Emergency (Essential Powers) Ordinance 1969<sup>76</sup> proclaimed that ‘...the breadth of the territorial waters of Malaysia shall be twelve nautical miles and such breadth shall, except in the Straits of Malacca, the Sulu Sea and the Celebes Sea be measured in accordance with articles 3, 4, 6, 7, 8, 9, 10, 11, 12 and 13 of the Geneva Convention on the Territorial Sea and Contiguous Zone 1958...’<sup>77</sup> The narrow limit of sea areas mentioned in the above articles were made because it is geographically impossible to extend Malaysia’s territorial sea up to 12 nautical miles without encroaching on neighbouring states’ right to extend territory on the same scale.<sup>78</sup> Malaysia has boundary delimitations by agreement with her neighbouring countries of Thailand<sup>79</sup> and Indonesia.<sup>80</sup> As far as delimitation agreement with Singapore is

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<sup>74</sup> B. A. Hamzah, *Malaysia Exclusive Economic Zone*, Pelanduk Publications, 1998, p 4. See also; <http://www.apec-oceans.org/economy%20profile%20summaries/malaysia-approved.pdf> (last visited 10 November 2005).

<sup>75</sup> The Convention on the Territorial Sea and the Contiguous Zone, Convention on the High Seas, Convention on the Fishing and Conservation of the Living Resources of the High Sea and the Convention on the Continental Shelf were all ratified on 21/12/1960.

<sup>76</sup> The Ordinance was promulgated under art. 150(2) of the Federal Constitution.

<sup>77</sup> Sec. 3(1) of the Ordinance.

<sup>78</sup> Some ocean space separating Malaysia from her neighbouring State were less than 24 nautical miles.

<sup>79</sup> Agreement between the Government of the Republic of Indonesia, The Government of Malaysia and the Government of the Kingdom of Thailand Relating to the Delimitation of the Continental Shelf Boundaries in the Northern Part of the Strait of Malacca, 21 December 1971; Treaty between the Kingdom of Thailand and Malaysia relating to the delimitation of the territorial seas of the two countries, 24 October 1979 (entry into force: 15 July 1982); Memorandum of Understanding between the Kingdom of Thailand and Malaysia

concerned, as an ex-colony of Great Britain, Malaysia also assumes all the rights and responsibilities deriving from the Straits Settlements and Johore Territorial Waters (Agreement) Act 1928, which was entered into in order to delimit certain parts of the Johore Straits that divides Malaysia and Singapore. The development of Malaysia's claim over natural resources were made via two specific laws extending Malaysia's territorial sovereignty to the seabed must also be mentioned here; the Continental Shelf Act 1966<sup>81</sup> and the Petroleum Mining Act 1966.<sup>82</sup> Prompted by the then emerging trend of 200 nautical miles as the maximum breadth for the exclusive economic zones, Malaysia also extended its sovereignty to 200 nautical miles above its continental shelf in 1980 vide the Exclusive Economic Zones Act 1984.

Malaysia's lead agencies relating to ocean governance are the Fisheries Department (under the Ministry of Agriculture), the Department of Environment<sup>83</sup> of the Ministry of Science, Technology and Environment (MOSTE), the MOSTE-National Oceanographic Directorate, the MOSTE-International Division, the Ministry of Foreign Affairs (MFA) Territorial and Maritime Affairs Division, MFA's Global Economic Development and Environmental Affairs Division, MFA's Regional Economic Cooperation and Social, Cultural and Maritime Division, the Ministry of Transport's Marine Department and

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on the delimitation of the continental shelf boundary between the two countries in the Gulf of Thailand (with map), 24 October 1979 (entry into force: 15 July 1982).

<sup>80</sup> Agreement between the Government of the Republic of Indonesia, The Government of Malaysia and the Government of the Kingdom of Thailand Relating to the Delimitation of the Continental Shelf Boundaries in the Northern Part of the Strait of Malacca, 21 December 1971; Agreement between the Government of Malaysia and the Government of Indonesia on the delimitation of the continental shelves between the two countries, 27 October 1969; Treaty between the Republic of Indonesia and Malaysia Relating to the delimitation of the Territorial Seas of the Two Countries in the Strait of Malacca, 17 March 1970.

<sup>81</sup> Act No. 83.

<sup>82</sup> Act No. 95.

<sup>83</sup> This is the lead department that oversees the implementation of the Environmental Quality Act 1974 (Amendments 1985, 1996) and matters pertaining to section IV of the Exclusive Economic Zone Act 1984. Generally, the Department's responsibility lies in the conservation and management of natural resources that promote its economic, social and environmental sustainability.

the Malaysian Industrial Development Authority (under the Ministry of Trade and Industry). The Fisheries Development Authority is a statutory body established pursuant to the Fisheries Development Authority Act 1971 in order to promote and protect the fishing industry in Malaysia. Other coordinating bodies include the Maritime Institute of Malaysia<sup>84</sup> and the Maritime Enforcement Coordinating Centre, which oversees maritime enforcement activities in Malaysian waters.<sup>85</sup> At the outset, it must be said that issues affecting Malaysia's marine environment are complex and intricately interwoven. Inter alia, marine environment policy would include issues relating to:

maritime space, protection and preservation of the marine environment, sustainable development of marine resources, marine [scientific] research, global climate change, invasion of exotic species, shipping and navigation, piracy and armed robbery at sea, underwater cultural heritage, human capacity building as well as international cooperation and coordination.<sup>86</sup>

Within these spheres and pressures, the government is focusing its efforts on areas that would eventually contribute to the realisation of 'optimum benefits' from exploitation of the ocean.<sup>87</sup> At the same time, the Government is also investing in efforts to minimise 'problems that have arisen, especially with regard to the limitations in harnessing the marine potential and the degradation of the marine environment and resources.'<sup>88</sup> In terms of the government policy on ocean resources exploitation and management, the 8<sup>th</sup> Malaysia Plan (for the year 2001-2005) sought primarily to introduce the *Dasar Zon*

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<sup>84</sup> <http://www.mima.gov.my>.

<sup>85</sup> Chapter 3 will discuss the role played by Malaysia's lead agency on the administration and protection of cultural heritage.

<sup>86</sup> Speech by Y.B. Dato' Seri Law Hieng Ding, the then Minister of Science, technology and the Environment, at The Opening Ceremony of ASIA-PACIFIC CONFERENCE ON MARINE SCIENCE AND TECHNOLOGY 2002, Kuala Lumpur, Malaysia.

<sup>87</sup> Ibid.

<sup>88</sup> Ibid.

*Pantai Negara* (the National Coastal Zone Policy)<sup>89</sup> in order to establish a uniform benchmarking system for the implementation of the Integrated Coastal Zone Management (ICZM) Plan in Malaysia.<sup>90</sup> Fostering integration of all areas of coastal and ocean governance involves integration of 'different uses of the sea and coast ... and coastal activities,' 'different levels of government [departments] responsible for maritime affairs management,' 'land-based activities and their impact on the sea', the integration of 'science into management and decision making process' and the integration, or rather the incorporation 'of international law and principles...into national management of maritime affairs.'<sup>91</sup> In view of the publication of the National Coastal Zone Policy, the government is currently reviewing the overall management of ocean affairs which will take into account various conflicting uses of the ocean. The review is based on three core issues; multiple-use conflict between the different uses of the sea, pollution of the marine environment and the enhancement of coastal and marine biodiversity.<sup>92</sup> Issues involving 'multiple-use conflict' include problems associated with land reclamation, fisheries, recreational use of the ocean as well as ecosystem conservation.<sup>93</sup> Underwater cultural heritage is a potential issue for consideration given the various users of the heritage. Unfortunately, it did not appear to be given extensive consideration in the review exercise, presumably because issues affecting underwater cultural heritage were handled under a different Ministry and

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<sup>89</sup> National Economic Planning Unit. *Rancangan Malaysia Ke-8 (8<sup>th</sup> Malaysia Plan)*. Percetakan Nasional Malaysia Berhad. 2001, p. 583. (Note: At the time of writing this thesis, the *Coastal Zone Policy* document is yet to be published and the researcher was unable to obtain more information on the details of this Policy document and its relationship to the marine cultural heritage resources).

<sup>90</sup> ICZM is a coastal management tool which has received global attention mainly since UN Conference on Environment and Development (UNCED) 1992 and at the World Summit on Sustainable Development (WSSD) 2002.

<sup>91</sup> Mohd Nizam Basiron, *Developing an Ocean Policy for Malaysia: Areas for Consideration in Environmental Management*, MIMA, p. 4.

<sup>92</sup> *Rancangan Malaysia ke-8*, above.

<sup>93</sup> Economic Planning Unit. *Integrated Coastal Zone Management: Status Document*, Kuala Lumpur.

implementing agency.<sup>94</sup> Hence there is a pressing need for a more integrated approach in marine and cultural heritage management.

#### **1.4.2 UNCLOS and its Restrained Approach towards the Underwater Cultural Heritage Protection**

Diplomatic attention on the issue of the protection of underwater cultural heritage has, for political reasons, been the focus of the international law of the sea due to various issues affecting national interests as well as jurisdiction over ocean space and resources. Although the problems relating to underwater cultural heritage, once simply referred to as 'historic wrecks', were addressed during the negotiation process of the 1958 Geneva Convention on the Continental Shelf, the international community did not settle conclusively on the subject, and the Geneva Conventions therefore do not provide a sound basis for the protection of underwater cultural heritage.<sup>95</sup> When the international community readdressed issues relating to the law of the sea at the UNCLOS III negotiations,<sup>96</sup> issues relating to underwater cultural heritage were only debated at a late stage and since ocean governance is a complex regime, the provisions relating to underwater cultural heritage did not mature into a more sophisticated regime at the time when the international community decided the Convention was ready for adoption. Thus, although UNCLOS 1982 contains provisions specifically intended to regulate activities affecting underwater cultural heritage, the actual

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<sup>94</sup> Policy issues on underwater cultural heritage are handled by the Ministry of Arts, Culture and Heritage and the implementing agency is the Department of Museum and Antiquity. Issues affecting ocean and the environment are handled by the Marine Department and the Department of Science, Technology and Environment.

<sup>95</sup> For comprehensive analysis of the Geneva Conventions in relation to the protection of the underwater cultural heritage see; Strati, A., 'Deep Seabed Cultural Property and the Common Heritage of Mankind', (1991) ICLQ 859-894, E. M. Fry, 'Recent Developments in the Law of the Sea', SAN DIEGO L. R. (1986), p. 701.

<sup>96</sup> Preamble to UNCLOS 1982.

magnitude of problems turn out to be much too complex to be fully addressed within the parameters set under UNCLOS.

The international community has thus underestimated the degree of significance attached to this heritage. This underestimation is unfortunate. Articles 149 and 303 of UNCLOS 1982 were the result of a hurried attempt to include underwater cultural heritage in the Convention, an attempt believed by some to be necessary to secure swifter consensus amongst the parties to the convention. A more elaborate regime was opposed by some delegations during the final deliberation of UNCLOS to avoid 'upsetting the carefully negotiated balance at such a late stage of the Conference.'<sup>97</sup> The unfortunate result is that articles 149 and 303 are vague and ambiguous in promoting the protection of underwater cultural heritage although they do at least express an affirmation of the need of such protection. One other significant reason why these two articles are replete with loopholes was glaring lack of expert advice on the matter at the time of their writing.<sup>98</sup> An example of this was on the issue of policing the area immediately beyond territorial waters leading to a premature conclusion that 'the vast seaward reaches of the economic zone and continental shelf were really not relevant to the problem', a misinformed view, since 'for various chemical and biological reasons, notably the virtual absence of oxygen, the deep sea bed or beyond the continental shelf is likely to contain the best preserved wrecks of all.'<sup>99</sup> Thus, in formulating article 149 and 303, the consensus had miscalculated the potential impact of underwater cultural heritage in the development of the law of the sea since the significance of underwater cultural heritage in areas beyond territorial jurisdiction is 'not related to the quantity of vessels involved, but rather to the probability that in many cases the remains will be of

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<sup>97</sup> M. Hayashi, 'Archaeological and historical objects under the United Nations Convention on the Law of the Sea', *MARINE POLICY*, (1996), Vol. 20, p. 294. On the so called 'package deal' approach of UNCLOS, see; Boyle & Chinkin, *The Making of International Law*, 2007, pp. 146-17.

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*



a very high quality [as] any wooden ship reaching the sea-bed is likely to do so reasonably intact... those which have are likely to be of great archaeological significance.<sup>100</sup>

### 1.4.3 The Extent of Coastal State Jurisdiction under 1982 UNCLOS

#### (a) Territorial Sea

It is well established that within areas of internal waters, territorial seas as well archipelagic waters,<sup>101</sup> the coastal (or archipelagic) State would normally enjoy sovereignty over those waters as well as the seabed and the subsoil thereof<sup>102</sup> subject to the principles relating to innocent passage. Consequently, within these zones, domestic legislation will govern the exploitation and protection of underwater cultural heritage and any unauthorised foreign ship engaged in activities directed at such heritage will be in breach of this principle.<sup>103</sup> Generally, coastal states' jurisdiction over wrecks found within its territory would involve their jurisdiction to remove wrecks for the purpose of navigational safety, managing salvage claims, and other issues relating to the protection of the wreck or regulating access to the wreck, as well as the determination of ownership of both the wreck itself and its cargo.<sup>104</sup> The two most important provisions, which have been the subject of much analysis by legal commentators in the field, are articles 149 and 303 of 1982 UNCLOS. However, apart from these provisions there are also other provisions, which are relevant to underwater cultural heritage. They include

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<sup>100</sup> Ibid.

<sup>101</sup> Art. 49 of UNCLOS 1982.

<sup>102</sup> Art. 2 of the Territorial Sea Convention 1958, Art. 2(1) and (2) UNCLOS 1982. One commentator argued that although the extent of Coastal State jurisdiction in 'internal waters' is not expressly provided under any of these Conventions as a result of terminological omission and since the coastal state sovereignty over the airspace, land and territorial sea is explicit, to suggest that Coastal lacks control over its own seabed below its internal waters cannot be maintained. See; R J Zedalis 'Military uses of ocean space and the developing international law of the sea: an analysis in the context of peacetime ASW' (1979) 16 SAN DIEGO L. R. 595.

<sup>103</sup> Art. 25(1) UNCLOS 1982.

<sup>104</sup> In Malaysia, these would be governed through the Merchant Shipping Ordinance 1952, Part IX relating to wrecks and salvage. See Chapter 5.



those that relate to the rights and duties of states with regard to internal waters, territorial seas, continental shelf and exclusive economic zone,<sup>105</sup> provisions on the construction of artificial islands and structures,<sup>106</sup> mechanisms for resolving conflicts between States in the exclusive economic zone,<sup>107</sup> the regulation of drilling activities,<sup>108</sup> freedoms of the high seas,<sup>109</sup> articles relating to sovereign immunity,<sup>110</sup> as well as matters pertaining to the relationship between UNCLOS 1982 and other conventions and agreements.<sup>111</sup> The following sections highlight the analysis made by legal experts in interpreting UNCLOS' most significant articles, which provide the regime of protection for underwater cultural heritage in maritime zones beyond the territorial sea.

#### **(b) Contiguous Zone**

Article 303 provides for States' duty 'to protect objects of an archaeological and historical nature found at sea' and to the duty 'co-operate' for that purpose.<sup>112</sup> It further provides that:

In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the sea-bed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.<sup>113</sup>

Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.<sup>114</sup>

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<sup>105</sup> Particularly those established under article 56 & 58 UNCLOS 1982.

<sup>106</sup> Art. 60, *ibid.*

<sup>107</sup> Art. 59, *ibid.*

<sup>108</sup> Art. 81, *ibid.*

<sup>109</sup> Art. 86 & 87, *ibid.*

<sup>110</sup> Art. 236, *ibid.*

<sup>111</sup> Art. 311, *ibid.*

<sup>112</sup> Art. 303(1), *ibid.*

<sup>113</sup> Art. 303(2), *ibid.*

<sup>114</sup> Art. 303(3), *ibid.*

This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.<sup>115</sup>

Coastal state's jurisdiction over historical and archaeological objects in the contiguous zone is probably best understood as having been a result of the increased recognition of the importance of contiguous zone in addressing problems such as the control of narcotic drugs trafficking (which necessitates the coastal state to enforce 'additional measures to prevent drug smuggling') as well as 'recent advances in techniques of underwater archaeology'.<sup>116</sup> Since article 303(2) of UNCLOS 1982 specifically refers to article 33 which deals with various aspects of coastal state's responsibility within the contiguous zone, it must mean such jurisdiction is further extended to control unauthorised removal of any objects from the sea bed only on the basis that such removals, if carried out, would infringe a coastal State's customs, fiscal laws or other regulations. Article 303 is also a result of a 'compromise measure' that resulted from concern over 'the status of cultural resources in ocean zones to which article 149 did not pertain'.<sup>117</sup> Although in article 303 (2) the right of a coastal State to control the movement of historical and archaeological artefacts is limited to the Contiguous zone, as has been claimed by US, The Netherlands, Poland, South Africa<sup>118</sup> and France,<sup>119</sup> other State practice in this area also suggests a divergence of the norm rather than

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<sup>115</sup> Art. 303(4), *ibid.*

<sup>116</sup> General Assembly Official report on the Progress made in the implementation of the Convention A/47/512 (1992) paragraph 13, 47. Also cited in Nordquist, *UNCLOS 1982: Commentary*, Vol. II, p. 275.

<sup>117</sup> D. R. Watters, 'The Law of the Sea and Underwater Cultural Resources', 48(4) *AMERICAN ANTIQUITY* (1983) 813.

<sup>118</sup> Vide the *Maritime Zones Act 1994* which provides for the establishment of maritime cultural zone extending from the outer limit of South Africa's territorial sea to the outer limits of the contiguous zone, in particular specifying that the same rights and powers 'as it has in respect of its territorial waters'.

Information available online at <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/africa.htm>.

<sup>119</sup> Vide Act No. 89-874 of 1 December 1989 concerning Maritime Cultural Assets and amending the Act of 27 September 1941, Regulating Archaeological Excavations of 1 December 1989.

international consistency. Australia,<sup>120</sup> Albania, Denmark, Ireland,<sup>121</sup> Jamaica,<sup>122</sup> Cyprus, Seychelles, Morocco, Portugal, Spain,<sup>123</sup> and most recently Mauritius<sup>124</sup> have all enacted legislation unilaterally extending their jurisdiction over archaeological and historical artefacts found on the seabed beyond the 24 nautical miles.

Malaysia does not establish any cultural heritage zone and none of the Malaysian laws relating to cultural heritage protection is extended to maritime areas beyond the territorial waters.<sup>125</sup> Furthermore, Malaysia does not proclaim any contiguous zone so far. However, it is interesting to note that, in 1996, the government made a declaration upon ratifying 1982 UNCLOS that; 'without prejudice to article 303 of the Convention on the Law of the Sea, that any *objects* of an archaeological and historical nature found within the maritime areas over which it exerts sovereignty or jurisdiction shall not be removed, without its prior notification and consent'.<sup>126</sup> It is submitted that the declaration contains a statement of 'intent' to exercise jurisdiction in various maritime zones. First, the sentence 'any objects... found within the maritime areas over which it asserts *sovereignty* or *jurisdiction*..' means that the Malaysian government intends to retain control over all objects in various maritime zones including the internal and territorial waters (where the government enjoys sovereignty) as well as exclusive economic zones (where the government asserts some form of jurisdiction at sea over

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<sup>120</sup> See; Bill Jeffrey, 'Australia', p. 11, in, *The Protection of the Underwater Cultural Heritage: National Perspectives in the Light of the UNESCO Convention 2001*, Dromgoole (ed.), 2<sup>nd</sup> Edt., Martinus Nijhoff, Leiden.

<sup>121</sup> Vide sec. 2(1) of the Continental Shelf Act 1968. See; Nessa O'Connor, 'Ireland', p. 142, in, Dromgoole, above, note 115.

<sup>122</sup> Vide Exclusive Economic Zone Act 1991.

<sup>123</sup> See; Mariano J. Aznar-Gomez, 'Spain', p. 276, in, Dromgoole, above, note 119.

<sup>124</sup> Mauritius Maritime Zones Bills 2005 declaring the cultural zone extending to 200 miles overlapping the Exclusive Economic Zone.

<sup>125</sup> The Exclusive Economic Zone Act 1984 simply incorporates the maritime zones established under UNCLOS 1982.

<sup>126</sup> Declaration made in respect of the 1982 UNCLOS ratification. Available at [http://www.un.org/Depts/los/convention\\_agreements/convention\\_declarations.htm#Malaysia%20Upon%20ratification](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Malaysia%20Upon%20ratification) (last visited 15/11/2005).

such objects). Literally speaking, anyone who intends to engage in any activity directed at the removal of such objects in the various maritime zones where the Malaysian government asserts 'sovereignty' and 'jurisdiction' including should secure prior consent of the government. Secondly, however, article 303 was worded in such a way that, although it contains statement of obligation to protect in a general provision, it limits the coastal State jurisdiction to the contiguous zone. Therefore, there seems to be a loophole in the extent of Malaysian law in this regard. In addition, the Exclusive Economic Zone Act 1984 as well as the Continental Shelf Act 1966 also do not extend Malaysia's jurisdiction over objects of archaeological or historical character found in areas beyond its territorial waters. Therefore, despite the declaration made by the Malaysian government was not given effect through legislation for it is clear that the scope of the Exclusive Economic Zone Act 1984, the Continental Shelf Act 1966, as well as the National Heritage Act 2005,<sup>127</sup> do not cover underwater cultural heritage beyond the territorial waters.

### (c) Extent of States Obligation under Art. 303

Article 303(1) connects 'the duty to protect objects of an archaeological and historical nature' with the duty on the part of States to 'cooperate' in carrying out that duty. The language of the provision is clear in that the obligations are expressed in term of a duty of states to 'protect' and to 'cooperate'.<sup>128</sup> These duties apply against objects found in the sea-bed contiguous<sup>129</sup> to the territorial sea of the coastal State.<sup>130</sup> The exercise of such

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<sup>127</sup> On the extent of the National Heritage Act 2005, see further, at ch. 4, para 4.4.1, p. 165.

<sup>128</sup> The duty to cooperate under international law is not merely aspirational as it does bare legal consequences as seen in the case of *North Sea Continental Shelf Cases* (1969) ICJ Rep. Para. 85; *Lake Lanoux* (France v. Spain) (1957) ILR, p. 128. On duty to cooperate under international law, see; Boyle and Birnie, *International Law and the Environment*, 2<sup>nd</sup> Edition, 2002, p. xx.

<sup>129</sup> Art. 33(2) the Contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured. Malaysia's contiguous zone is declared vide the Contiguous Zone Act.

<sup>130</sup> Art. 303(2).

jurisdiction is, however, limited to controlling 'traffic in such objects', 'in applying article 33',<sup>131</sup> and, in presuming 'that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.' Thus, coastal states exercise limited jurisdiction in the contiguous zone in respect of objects of archaeological and historical interest. The rationale for the inclusion of the expression 'in applying article 33' under article 33 is unclear. One view is that the article does not 'require the coastal state to assert any right of control under article 33 for the purpose of exercising its rights under 303.... The implication is that the coastal state's rights of control under article 33 exist independently of its rights under article 303, and that there is no interrelationship between the two articles'.<sup>132</sup>

On the surface, article 303, as is the case with article 149, merely focuses on providing a mechanism of control over the movement of 'objects' found in the zones stated rather than offering protection to the site that the 'objects' were found, or the protection of objects in situ. Thus, no question of liability would arise if, for instance, underwater cultural heritage was destroyed on its site, during oil exploration.<sup>133</sup> However, Strati earlier argued that such restrictive interpretation of article 303 is not correct since the natural consequence of the general duty to protect these objects must also mean the protection of the site concerned.<sup>134</sup> This is an ideal proposition but no doubt a matter of subjective interpretation.

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<sup>131</sup> Article 33 establishes that 'in a zone contiguous to the territorial sea, described as the contiguous zone, the coastal state may exercise control necessary to: (1) (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea (b) punish infringement of the above laws and regulations committed within its territory or territorial sea.'

<sup>132</sup> Nordquist, UNCLOS 1982 Commentary, Vol. II, Nandan and Rosenne (eds.), 1993, p. 275.

<sup>133</sup> Scovazzi, T., 'Convention on Protection of the Underwater Cultural Heritage', *ENVIRONMENTAL L. & POLICY*, (2002), p. 152, 157.

<sup>134</sup> Sрати, above, note 62, p. 182.

In addition, article 303 provides that, in the exercise of that duty to protect and to cooperate, it shall not affect 'the rights of identifiable owners' and the application of 'the law of salvage' or established 'rules of admiralty' as well as 'laws and practices' which have bearing on 'cultural exchanges'.<sup>135</sup> This provision too has been interpreted by legal commentators as lending an advantageous benefit to commercial exploiters of the resources.<sup>136</sup> Further complicating this matter is the inclusion of a vague reference to other 'laws and practices' with no further elaboration as to the actual contents of these 'laws and practices'. The strength of article 303 is perhaps in the provisions encouraging States to enter into 'international agreement' 'regarding the protection of objects of an archaeological and historical nature'<sup>137</sup> as this could be the solution to remedy the uncertainty behind the 1982 UNCLOS regime.<sup>138</sup> The 2001 UNESCO Convention is undoubtedly an international instrument for that purpose.

#### **(d) Continental Shelf and Exclusive Economic Zone**

It is settled that coastal States' jurisdiction over the continental shelf 'for the purpose of exploring and exploiting its natural resources' does not include the exercise of rights and responsibilities over underwater cultural heritage. According to the International Law Commission, 'it is clearly understood that the rights in question do not cover objects such as wrecked ships and their cargoes (including bullion) lying on the seabed or covered by the sand of the subsoil.'<sup>139</sup> As far as the continental shelf and the exclusive economic zones beyond the contiguous zone are concerned, they are very much a muddy area. Although UNCLOS does reiterate the coastal States' sovereign rights over the continental shelf 'for the purpose of exploring it and exploiting its natural

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<sup>135</sup> Art. 303(3).

<sup>136</sup> Scovazzi, above, note 127, p. 154.

<sup>137</sup> Art. 303(4).

<sup>138</sup> Scovazzi, above, p. 154.

<sup>139</sup> Report of the International Law Commission, U.N. GAOR Supp. (No. 9) at 42, U.N. Doc. A/3159 (1956).

resources',<sup>140</sup> coastal State exclusive jurisdiction over 'archaeological and historical objects' on continental shelf does not extend beyond the contiguous zone as they are not regarded as natural resource although one may argue that the value of underwater cultural heritage itself is enhanced by an act of nature.<sup>141</sup>

The establishment of Malaysia's exclusive economic zone vide the Exclusive Economic Zones Act 1984 states that Malaysia's 'sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources; whether living or non-living, of the seabed and subsoil and the superjacent waters, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds.'<sup>142</sup> It also states that the government has the right in particular for '(i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; (iii) the protection and preservation of the marine environment' as well as other 'rights and duties as are provided for by international law'.<sup>143</sup> As mentioned earlier, Malaysia does not establish any cultural heritage zone and does not make any objection, so far, to other States declaring a cultural heritage zone. In fact, none of the countries in the Southeast Asia region has established a cultural heritage zone. Despite the unilateral assertions made by some coastal states over archaeological resources in their exclusive economic zones, UNCLOS 1982 does not attribute such jurisdiction to coastal states. In the event that coastal States do not assert jurisdiction over historical objects in the exclusive economic zone, it would appear that the underwater cultural heritage lying on the seabed in those areas are exposed to the dangers of unregulated human interferences. The contradiction within article 303 of UNCLOS 1982 is that, with it being a general

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<sup>140</sup> Art 77(1) UNCLOS 1982.

<sup>141</sup> Chapter 5 discusses the value of wrecks as marine habitat.

<sup>142</sup> This is derived from art. 56(1) of UNCLOS 1982 which provides for the sovereign rights of coastal States in exploring and exploiting natural resources in the EEZ.

<sup>143</sup> Sec. 4 of the Exclusive Economic Zone Act 1984.



provision, it speaks of the general duty to protect and to cooperate without reference to any particular maritime zone. Therefore, presumably, all States have a duty to protect seabed artefacts. Article 303(2) however limits the coastal State's jurisdiction, based on article 33, only within contiguous zone.<sup>144</sup> In so far as the exclusive economic zone beyond the contiguous zone is concerned, the concept of freedoms of the high seas could apply to activities directed towards the recovery of objects of archaeological and historical importance.<sup>145</sup>

It has been argued that the act of the Thai authority in 1994 in confiscating all artefacts recovered from the *Thai Junk* incident in the Gulf of Thai did not appear to have any legal basis under international law or even under Thailand legislation<sup>146</sup> since beyond the outer limit of the contiguous zone, coastal States simply do not have jurisdiction over underwater cultural heritage. Strati, however, argued that a:

Coastal State may take advantage of their extensive rights in the 200 n.m. zone and exercise control over the underwater cultural heritage indirectly, by claiming that archaeological research... interferes with their resource-related rights or by employing articles 60 and 80, which grant them a wide range of powers over the construction and use of installations on the seabed.<sup>147</sup>

In any case, in the event of a dispute where UNCLOS 'does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone' it is possible for States of 'historical or cultural origin' to assert an interest and thereby invoke article 59 of 1982 UNCLOS, resolving conflict 'on the basis of equity and in the

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<sup>144</sup> David R. Watters, above, note 59, 813.

<sup>145</sup> M. Hayashi, below, 296.

<sup>146</sup> Tony Wells, *Shipwrecks and Sunken Treasure in Southeast Asia*, Times Editions, 1995, p. 143.

<sup>147</sup> Strati, above, note 62, p. 866.



light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as to the international community as a whole.<sup>148</sup>

**(e) The Area**

Much of the problems relating to the protection of the underwater cultural heritage relate to the perceived lack of control over discovery of objects in areas beyond the territorial sea or the contiguous zone, since the farther one gets from the jurisdiction of the Coastal State, the lesser is the control mechanism that can be imposed on these activities. The 'Area' is a zone which was originally established for sea-bed mining and which is to be administered by an international authority. A liberal interpretation of the law of the sea doctrine of 'Freedom of the High Seas' entails anyone being able to recover objects of historical and cultural value from the seabed if it is beyond national jurisdiction. Hayashi contended that freedoms of the high seas under the 1958 Geneva Convention (which later became the basis of high seas freedoms under UNCLOS) would include the search for and recovery of historic wrecks in the high seas, although this was never expressly provided under the Geneva Convention.<sup>149</sup> Any attempt to restrict the application of 'freedoms of the high seas' in favour of coastal State jurisdiction over historical or archaeological objects on the continental shelf would also find little support in international law as it is settled that the expression 'mineral and other non-living resources' does not under the Geneva Convention include sunken shipwrecks and their cargoes.<sup>150</sup>

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<sup>148</sup> Art. 59 UNCLOS 1982.

<sup>149</sup> M. Hayashi, 'Archaeological and Historical Objects under the United Nations Convention on the Law of the Sea', (1996) *MARINE POLICY*, 291-296, at 293-294, also citing Caflisch L., 'Submarine Antiquities and the International Law of the Sea', *NETHERLANDS Y. B. INT'L L* (1982) 2, at p. 25.

<sup>150</sup> International Law Commission, Commentary to article 68 paragraph 5, *YEARBOOK OF INTERNATIONAL LAW COMMISSION*, Vol. II (1956), p. 298. See also; M. Hayashi, above, p. 294 and Caflisch L., 'Submarine Antiquities and the International Law of the Sea', 13 *NYIL* (1982) 3, 14.

UNCLOS' answer to solving the lack of control over activities directed at underwater cultural heritage in the Area is by making it an obligation on all States to ensure that:

All objects of an archaeological and historical nature found in the area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the state or country of origin, or the state of cultural origin, or the state of historical and archaeological origin.<sup>151</sup>

As is the case with article 303, article 149 focuses on the protection of 'objects' as opposed to 'objects and site' as a collective value.<sup>152</sup> Other major issues leading to criticism of this article include the obscurity of the meaning 'archaeological and historical nature',<sup>153</sup> the nature of the 'preferential rights' of State of origin over the archaeological or historical objects found in the area, as well as the absence of a clear indication and elaboration of the regulatory role of the Seabed Authority.<sup>154</sup> On the nature of preferential rights and the role of the International Seabed Authority, the views of Turkey and Greece during the negotiation of UNCLOS 1982 provide useful reference. According to Turkey's draft proposal of article 149, 'preferential rights'

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<sup>151</sup> Art. 149 of UNCLOS 1982.

<sup>152</sup> Elia, R. J., 2000, 'US Protection of underwater cultural heritage beyond the territorial sea: problems and prospects.', *IJNA*, 29: 43-56 but c.f. the view of Strati, above, p. 32.

<sup>153</sup> The rationale for the imposition of the phrase 'historical nature' in that article is obscure. O'Keefe argued that even the adjective word 'archaeological' is not capable of meaning since 'archaeology is a process and not a description' and with that he contended that 'objects cannot have an archaeological nature'; O'Keefe, above, note. 14, p. 17. For the genesis of these terms, see; Anastasia Strati, the Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea, p. 176-182 and Lucius Caflisch, 'Submarine antiquities and in the international law of the sea,' *XIII NETH. Y.B. INT'L L.* (1982), p. 7-10.

<sup>154</sup> Nordquist, Nandan. *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. VI, 2002, p. 231; E. Brown, UNESCO SOURCES. No. 87. February 1997. See UNCLOS Commentary, Vol. VI, above, p. 227-232, and; Moritaka Hayashi, above, 291-296.

would include the right to acquire the treasure for national keeping.<sup>155</sup> The proposal reads:

1. Archaeological and historical treasures to be discovered during the exploration and exploitation of the area constitute a part of the common heritage of mankind and as such shall enjoy the protection of the International Authority...
2. *The state of the country of origin shall have the right to acquire the treasure from the International Authority against payment.* In case the State of the country of origin opts not to exercise its right to acquire the treasure, the International Authority shall have the right to sell the treasure to authorised third parties or keep it in a museum belonging to the International Authority or to the United Nations...<sup>156</sup>

Greece, on the other hand, specifically proposed that 'the State of Cultural origin of such objects shall have the preferential right to undertake the *salvaging of such objects* and to *acquire any such object* under procedures to be established by the Assembly, including compensation of the Authority' and 'if the State of cultural origin does not avail itself of its preferential right under paragraph 3 above the Authority will see to it that such object is disposed of in accordance with the principle in paragraph 1 above'.<sup>157</sup> In addition, the UN General Assembly Resolutions on Restitution of Cultural Property to the Countries of Origin stated that 'member States engaged in seeking the recovery of cultural and artistic treasures from the seabed, in accordance with international law, to facilitate by mutually acceptable conditions the participation of States having a historical and cultural link with these treasures'.<sup>158</sup> In any case, it must be recalled that

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<sup>155</sup> Turkey Proposal. A/AC.138/SC.I/L.21 (1973) reproduced in Satya N. Nandan, ed., *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. VI, Martinus Nijhoff, 2003, p. 227-228.

<sup>156</sup> Ibid. In addition, Turkey proposed that 'the International Authority, in consultation with concerned specialised agencies of the United Nations, shall draw up rules for regulating the discovery, identification, protection, acquisition and disposal of archaeological and historical treasures discovered in the area.'

<sup>157</sup> Greece Proposal. A/AC.138/SC.I/L.25 (1973) reproduced in Satya N. Nandan, ed., above, note 93, p. 228.

<sup>158</sup> See; Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea*, p. 46.

the principle underlying article 140 is that 'activities in the Area shall as specifically provided for in this Part, be carried out for the benefit of humankind as a whole.' This collective reference 'for the benefit of humankind as a whole' should be the guiding principle in the disposal of the underwater cultural heritage found in the Area and it would perhaps includes all States 'irrespective of the geographical location of States, whether coastal or landlocked'.<sup>159</sup> In fact, this duty is owed by the present generation of humankind to the future generation. As Dupuy asserted, the expression 'mankind' is 'trans-patial, in that it regroups all contemporaries irrespective of the location of their establishment; its scope is trans-temporal, because mankind does not include only today's peoples, but also those who will come.'<sup>160</sup> Other guiding principles would be that article 149 should be read together with article 87 'on freedoms of the high seas'<sup>161</sup> and article 141 on 'peaceful purposes.'<sup>162</sup>

However, in the absence of a clear regulatory role of an international entity such as the International Seabed Authority, it is uncertain how the objectives of the preservation of historical or archaeological objects could be carried out for the benefit of humankind as a whole. The Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area, does provide that 'the contractor shall immediately notify the Secretary-General in writing of any finding in the exploration area of an object of an archaeological or historical nature and its location. Following the finding of any such

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<sup>159</sup> Article 140(1) UNCLOS 1982.

<sup>160</sup> R. J. Dupuy, 'The Notion of Common Heritage of Mankind Applied to the Seabed', in Rozakis and Stephanou (eds.), *The New Law of the Sea*, 1983.

<sup>161</sup> The article lists out six freedoms of the high seas; navigation, over-flight, laying submarine cables and pipelines, to construct artificial islands and other installations, fishing as well as scientific research. Art. 86 of UNCLOS 1982 defines high seas as 'all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State'.

<sup>162</sup> Art. 141 provides that 'the Area shall be open to use exclusively for peaceful purposes by all States, whether coastal or land-locked, without discrimination and without prejudice to the other provisions of this Part.

object... the contractor shall take all reasonable measures to avoid disturbing such object.’<sup>163</sup> It is in this connection that the role of the Secretary-General of the ISA is clear, that is, in transmitting all necessary information to the Director-General of UNESCO,<sup>164</sup> but beyond this, no more can be said of the role of the International Seabed Authority and how it can go about preserving archaeological or historical objects for the benefit of humankind as a whole.

**(f) Particularly Sensitive Sea Areas (PSSA) and Marine Scientific Research**

Another issue which might also have an impact on the protection of the underwater cultural heritage as part of the marine environment is the implementation of the Particularly Sensitive Sea Areas as defined in the Resolution A.720(17) on *Guidelines for the designation of Special areas and the Identification of Particularly Sensitive Sea Areas*.<sup>165</sup> The earlier IMO Guidelines defines Particularly Sensitive Areas of the Sea an area which needs special protection through action by IMO because of its significance for recognised ecological or socio-economic or scientific reasons and which may be vulnerable to environmental damage by maritime activities’.<sup>166</sup> The IMO Guidelines

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<sup>163</sup> See; International Seabed Authority, ‘Decision of the Assembly Relating to the Regulations on Prospecting and Exploration for Polymetallic Nodules in the Area’, Regulation 34 and Annex 4, section 7 (ISBA/6/A/18) available at:

[http://www.natural-resources.org/minerals/cd/docs/int\\_law/ISBA\\_6\\_A\\_18\\_en.pdf](http://www.natural-resources.org/minerals/cd/docs/int_law/ISBA_6_A_18_en.pdf) (last visited on 27 July 2007).

<sup>164</sup> See Nordquist, Nandan, above, p. 231.

<sup>165</sup> Adopted on 6 November 1991 by the IMO Assembly (Hereinafter the Old IMO Guidelines). For a fuller analysis of the relevance of PSSA regime to underwater cultural heritage under the old Guidelines, see Agustin Blanco-Bazan, the IMO Guidelines on particular Sensitive Areas (PSSAs): Their Possible Application to the Protection of Underwater Cultural Heritage, (1996) MARINE POLICY, p. 343-349. It must be noted that IMO Guidelines had been revised twice; first through Resolution A.927(22) adopted on 29 November 2001 ‘Guidelines for the Designation of Special Areas under MARPOL 73/78 and Guidelines for the Identification and Designation of Particularly Sensitive Areas’ (Doc. A.22/Res.927) and recently through Resolution A.982(24) adopted on 1 December 2005 ‘The Revised Guidelines for the Identification and Designation of Particularly Sensitive Areas through Resolution’ (Doc. A 24/Res.982).

<sup>166</sup> Paragraph 3.1.2 of the earlier IMO Guidelines. So far designation under IMO Guidelines are the Great Barrier Reef (Australia), the Sabana-Camaguey Archipelago (Cuba), Malpelo Island (Colombia), Florida Keys (USA), Wadden Sea (Denmark, Germany, Netherlands, Paracas National Reserve (Peru), Western

also gave a list of criteria for classification under Particularly Sensitive Sea Areas which included 'historical and/or archaeological significance' under the 'scientific' category.<sup>167</sup> However, the guidelines did not further outline what measures should be implemented in relation to PSSAs established for historical or archaeological consideration. It must be recalled that the need for the special treatment of Particularly Sensitive Sea Areas originates from Resolution 9 of the International Conference on Tanker Safety and Pollution Prevention 1978 whereby States are to take certain measures in the sea areas which may be in 'special need of protection against marine pollution from ships and dumping' and 'account should be taken of areas' particular sensitivity in respect of their renewable sources and their importance for scientific purposes. The earlier IMO Guidelines included areas of historical and archaeological significance as one of elements that could be considered for consideration for PSSA and on this basis the IMO Guidelines could provide guidelines for the protection of underwater cultural heritage. This criterion however was deleted from the revised Guidelines at the insistence of the United Kingdom and the USA on the grounds that the subject matter relating to underwater cultural heritage was being considered at UNESCO,<sup>168</sup> so it would seem that the 2001 Revised Guidelines offer no solution for the protection of underwater cultural heritage at all. Fortunately, 'the presence of significant historical and archaeological sites' was reincorporated into the list of criteria for the establishment of PSSAs under the most recent Guidelines.<sup>169</sup> At least to the extent of adopting measures to protect certain maritime areas against damage from international shipping activities, the IMO Guidelines can provide a solution for the protection of underwater cultural heritage.

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European Waters, Torres Strait (Australia and Papua New Guinea), Canary islands (Spain), Galapagos Archipelago (Ecuador) and most recently the Baltic Sea (Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland and Sweden.

<sup>167</sup> Paragraph 3.3.7.4 of the IMO Guidelines.

<sup>168</sup> De La Fayette, L., 'Achievements in 2001', *ENVIRONMENTAL LAW AND POLICY* (2002), p. 146, 149.

<sup>169</sup> Para 4.4.14 of the 'Revised Guidelines for the Identification and Designation of Particularly Sensitive Areas' adopted on 1 December 2005 adopted through IMO Resolution A.982(24) Doc. A.24/Res.982.



Certain principles dealing with the regulation of activities affecting underwater cultural heritage can also be potentially developed through the marine scientific research regime as provided in Part XIII of UNCLOS 1982.<sup>170</sup> Article 238 provides that 'all States, irrespective of their geographical location, and competent international organisations have the right to conduct marine scientific research subject to the rights and duties of other States as provided for in this Convention.' After all, the implementation of marine scientific research is guided by the same principles; it too should be 'exclusively for peaceful purposes and for the benefit of mankind as a whole'.<sup>171</sup> If marine archaeology can be regarded as marine scientific research, the principles governing the conduct of the marine scientific research as provided under the Convention provide useful guidance.<sup>172</sup> It is not too far-fetched to regard activities relating to the discovery and recovery of archaeological objects at sea as marine scientific research. In fact, technology developed for marine scientific research has been a boon for those involved in the search for and recovery of underwater cultural heritage.<sup>173</sup> In addition, scientists themselves regard the underwater archaeology as 'the scientific study of the material

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<sup>170</sup> Art. 238 – 240 of 1982 UNCLOS.

<sup>171</sup> Art. 143 of 1982 UNCLOS.

<sup>172</sup> Art. 240 provides that marine scientific research '(a) shall be conducted exclusively for peaceful purposes, (b) with appropriate scientific methods and means compatible with this Convention, (c) marine scientific research shall not unjustifiably interfere with other legitimate uses of the sea compatible with this Convention and shall be duly respected in the course of such uses, and (d) shall be conducted in compliance with all relevant regulations adopted in conformity with this Convention including those for the protection and preservation of the marine environment.' See also articles 143, 256 & 257 of UNCLOS as these principles are applicable in the high seas and in the Area. Art. 256 restates the those rights under art. 238.

<sup>173</sup> Boesten, E., *Activities Affecting Archaeological and/or Historical valuable Shipwrecks in International waters: Public International law and What it Offers*, 2002, The Hague, p. 71, cited two examples, which illustrate the connection between MSR and Marine archaeology. First, the Titanic which 'was discovered using the technology developed for the study of the seafloor.' (ref: D. Yoeger, 'Historical and Archaeological Treasures, The Titanic: A case study technical implications', in *New Developments in Marine Science and Technology: Economic, Legal and Political Aspects of Change*, p. 80) and secondly, the high frequency Slide Scan Sonar which was specifically developed in order to find shipwrecks is now also used for seabed imaging in general (see fn. 242, p. 71).

remains of man and his activities upon seas'.<sup>174</sup> Unfortunately, scientific activities relating to underwater cultural heritage are not regarded falling under the same umbrella of marine scientific research under UNCLOS.<sup>175</sup> Consequently, under UNCLOS, anyone conducting marine archaeology on the continental shelf and in the exclusive economic zone need not obtain the consent of coastal State as is the case with marine scientific research.<sup>176</sup>

#### **1.4.4 Regulating Private/Commercial Interests and the Dominance of the Law of Salvage and Law of Finds**

Where coastal States do not assert jurisdiction over underwater cultural heritage we find a legal 'grey area' that opens the doors for activities directed at the heritage. Such activities usually involve the salvaging of historic wrecks and are regulated by the law of finds or the law of salvage. 1982 UNCLOS does not exclude the application of both of these laws. In fact, some commentators see that the Convention preserves the application of salvage laws<sup>177</sup> while others lamented that UNCLOS 1982 gives salvage laws and other rules of admiralty 'an overarching status'.<sup>178</sup> Salvage law takes dominance through the wording of article 303(3) of UNCLOS 1982, which explicitly provides that 'nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural

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<sup>174</sup> Ibid. (Citing: E. M. Miller, *A Time for Decision on Submerged Cultural Resources*, 1988).

<sup>175</sup> Marine scientific research as envisaged under the Continental Shelf Convention 1958 focused more on 'oceanography' and 'the scientific study of ocean basins, the ocean and its contents'. UNCLOS does not specifically define the meaning of marine scientific research. For discussion on the meaning of marine scientific research, see; Churchill, R, and Lowe, A. V., *The Law of the Sea*, 1999, pp. 405-406.

<sup>176</sup> Art. 246(2) provides that 'marine scientific research in the exclusive zone and on the continental shelf shall be conducted with the consent of the coastal state' and art. 246(3) provides that 'Coastal States shall, in normal circumstances, grant their consent for marine scientific research projects by other States... in their exclusive economic zone or on their continental shelf to be carried out in accordance with this Convention exclusively for peaceful purposes and in order to increase scientific knowledge of the marine environment for the benefit of all mankind'.

<sup>177</sup> Brice, Geoffrey, 'Salvage and the Underwater Cultural Heritage', (1996) *MARINE POLICY*, p. 338.

<sup>178</sup> Scovazzi, T. 'A Contradictory and Counter Productive Regime' in Garabello, R. and Scovazzi, T. (eds.) *The Protection of the Underwater Cultural Heritage*, 2003, p. 8.



exchanges'. This provision leaves a distinct impression that in the event of conflict between the application of the law of salvage and that of the general duty to protect the underwater cultural heritage as enunciated under UNCLOS 1982, the former shall prevail. It would seem that this article was drafted in consideration of the recognition of the legitimate private interest. It is precisely in recognising such a legitimate interest that the 2001 UNESCO Convention gives room for the application of salvage and laws of finds subject to certain conditions of conformity. While both laws are concerned with assertion of interest over discovered wrecks or heritage objects, they differ on the point of purpose. Where the object of the law of finds is concerned with the status of ownership over findings, a finder in a salvage claim seeks to assert title over a finding in the absence of a rightful owner, where, unlike a finder, he is not concerned with, nor does he claim ownership rights over, wrecks.<sup>179</sup>

At international level, commercial salvage is governed by the 1989 Salvage Convention, which entered into force from 14 July 1996.<sup>180</sup> The Convention replaces the 1910 Brussels Convention on Salvage. The 1989 Salvage Convention defines 'salvage' as 'any act or activity to assist a vessel or any other property in danger in navigable waters or in any water whatsoever.'<sup>181</sup> Although it is not impossible to technically distinguish between 'salvage' and 'assistance', it is also no longer necessary, and whatever distinction is there between the two has been abolished by the 1910 Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea.<sup>182</sup> The essence of salvage law is 'to assist a vessel' which is 'in marine peril' and in this sense, because a shipwreck has already sunk, the question is whether historic wrecks are in 'marine peril' for salvage purposes. In commonwealth jurisdictions, such as the United

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<sup>179</sup> Sarah Dromgoole and Nicholas Gaskell, 'Draft UNESCO Convention on the Protection of the Underwater Cultural Heritage 1998', 14 *INT'L J. MARINE & COASTAL L.* (1999) 171.

<sup>180</sup> See; [http://www.imo.org/Conventions/mainframe.asp?topic\\_id=259&doc\\_id=687](http://www.imo.org/Conventions/mainframe.asp?topic_id=259&doc_id=687) (last visited July 2007)

<sup>181</sup> Art. 1(1) Salvage Convention 1989.

<sup>182</sup> Art. 1 of the 1910 Convention.

Kingdom and Malaysia, shipwrecks are considered to be 'marine in peril' because they are still subject to danger.<sup>183</sup> The 1989 Salvage Convention is silent on this point and it leaves the question to the 'national courts to decide whether property on the seabed is in danger.'<sup>184</sup> The Convention applies to historical wrecks only insofar as a party has not opted out. Article 30(1) provides four situations where States may reserve the right not to apply the provisions of the Convention:

- (a) when the salvage operation takes place in inland waters and vessels involved are of inland navigation
- (b) when the salvage operations take place in inland waters and no vessel is involved
- (c) when all interested parties are nationals of that State
- (d) when the property involved is maritime cultural property of prehistoric, archaeological or historical interest and is situated on the seabed.

There are currently only 46 countries in the world that are Parties to the Salvage Convention 1989. Malaysia is not a member to the Convention nor is any of the countries within the ASEAN region. Australia, Canada, China, Croatia, France, Greece, Iran, Netherlands, Norway, Russian Federation, Saudi Arabia, Spain, Sweden and the United Kingdom have all made reservations permitted by article 30(1)(d) regarding the application of the Convention over maritime cultural property of prehistoric, archaeological or historic interest.<sup>185</sup> However, although the Salvage Convention recognises States' rights not to apply the Convention over objects of 'maritime cultural property', this is not compulsory and one is back to the question of whether, in the event the Salvage Convention does apply, the application of the law of salvage is in harmony with the overall objective of protecting underwater cultural heritage.

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<sup>183</sup> This will be discussed further under chapter 5.

<sup>184</sup> S Dromgoole and N Gaskell, 'Interests in Wreck Part II', *ART, ANTIQUITY AND LAW* (1997) 223

<sup>185</sup> See IMO website on depositary information at <http://www.imo.org>.

## 1.5 Conclusion

Great strides in the technological advancement of deep seabed underwater recovery have paved the way for a booming of treasure hunting industry. The increase of treasure hunting, which is often unregulated and often carried out using destructive techniques, has become a serious threat underwater cultural heritage. This problem, compounded by States' lack of control in the sea areas beyond its jurisdiction are the pivotal factors which have resulted in the need to develop a much more advanced legal regime to protect such heritage.

Though wrought with uncertainty in outlining the extent of protection given to underwater cultural heritage, the legal regime of protection afforded under the 1982 UNCLOS, is the legal antecedent for the adoption of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage. The main problems seem to be the much constrained ambit of protection, of the expression 'archaeological or historical objects' (which in itself does not adequately define underwater cultural heritage) and the precise content and description of the States' duty to protect. These are further compounded by the absence of a singular regulatory body overseeing activities affecting underwater cultural heritage in the 'Area', as well as the dominance and application of salvage law and other rules of admiralty in the event of a conflict between these laws and States' measures to protect underwater cultural heritage.

However, on a more positive note, 1982 UNCLOS does provide a basis for the protection of underwater cultural heritage, both within the territoriality of coastal state jurisdiction and as well as on the universality principle. UNCLOS too encourages the international community to enter into further agreements for this purpose. Without the 2001 UNESCO Convention, Malaysia's obligation on the international platform for the protection of the underwater cultural heritage must be examined from the viewpoint of its commitment made under 1982 UNCLOS as well as various other UNESCO

conventions relating to cultural heritage protection to which it is a party. This is where the 2001 UNESCO Convention comes into picture, being a universal attempt to fill the legal lacunae present under UNCLOS and under other international agreements on cultural heritage protection.

## CHAPTER TWO

### The 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage

#### 2.1 Introduction

##### 2.1.1 Malaysian Position

The main objective of this Chapter is to examine the core issues and values underpinning the UNESCO Convention 2001 and to assess whether Malaysia should proceed to ratify the Convention. The analysis involves the evaluation of the core features of the Convention, the conflicting views and the compromises that shape the outlook of the Convention, as well as the general principles and archaeological values enshrined in the Annexed Rule of the Convention. The stand taken by the Government of Malaysia during the final expert meeting of the UNESCO Convention on the Protection of the Underwater Cultural Heritage in Paris was to vote in favour of its adoption.<sup>1</sup> There is no published information on the reasons thereof and an inquiry made with the Department of International Division and Advisory at the Attorney General's Office in Putrajaya on certain core issues relating to the Convention gave little insight.<sup>2</sup> However, several conclusions on the Malaysian position can be made based on the following pointers:-

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<sup>1</sup> Information by the Department of Museum and Antiquity, Kuala Lumpur, Malaysia and the International and Advisory Division of the Attorney General Office, Putrajaya, Malaysia.

<sup>2</sup> Interview with Ms. Maizurah Tajuddin via email dated 15 April 2004 where she explained that the Division was unable to comment further on the stand taken by the government of Malaysia until certain core policy issues have been addressed by the relevant Ministry and implementing agency. Another interview with Mr. Khairuddin of the Department of Museum also revealed little insight. However, the National Heritage Act 2005 which came into force on 30 March 2006 can be construed as preparatory measures taken by the government in view of adopting the Convention.

- (a) Firstly, Malaysia is a member of the G77 group which lobbied for the adoption of the Convention.
- (b) Secondly, its geographical position is the smack in the middle of a historic maritime trade route between the east and the west, replete with potential for further discovery of sunken historic wrecks.
- (c) Thirdly, the antiquities administration is not sufficiently supported by official expertise in advising the government in underwater marine archaeology (for example; its current practice relating to underwater cultural heritage exploration is dependent on the aid of private commercial salvage companies).
- (d) And last but not least, during the negotiation period of the UNESCO Convention, the government was mainly represented by officials from the Department of Museum and Antiquity i.e. the archaeologists.

The last point is highlighted not to insinuate the tendency for bias by archaeologists in taking a firm stand to adopt the Convention but it does reflect on how one's approach would significantly influence the view taken in evaluating the overall significance of the Convention. It could be argued that different approaches would result in a different strategy and different results. Had Malaysia been represented by the Marine Department who views matters relating to the exploration and exploitation of the ocean resources in the light of security concerns, the government might have taken a different stand. In a similar vein, Sarah Dromgoole was of the view that the approach taken by the United Kingdom government during the UNESCO deliberations was reflected through the presence of the 'two heavy weights' of UK government departments - i.e. the Foreign and Commonwealth Office (FCO) and the Ministry of Defence (MOD) and her analysis is reproduced below:

It needs to be recognised that the terms of the Convention impact upon all sorts of highly sensitive and complex issues beyond the confines of

archaeology – in particular, issues affecting the finely balanced package of rules for international jurisdiction embodied in the UN Convention on the Law of the Sea 1982 and the *FCO and the MOD were simply fulfilling their legitimate function in protecting the UK's national interests as a whole. The influence of the government department responsible for heritage matters [namely] the Department of Culture, Media and Sport was weak in comparison. This was partly due to the Department's lack of political clout, but partly also to the fact that the government's archaeological expertise is hived off from the Department in the heritage agencies and was not properly tapped. English Heritage in particular, was necessarily on the sideline because it has not yet formally taken over responsibility for [underwater cultural heritage] in territorial waters.*<sup>3</sup>

This assessment partly explains the uncertain stand taken by the Malaysian government over the matter. In 2002, during a special workshop to study the 2001 Convention, the Department of Museum was heavily criticised for the stand taken by the government to vote in favour of the Convention. The resolutions and recommendations achieved during the workshop indicate the differing views and serious disagreement amongst and between government archaeologists and other governmental agencies on certain core issues underpinning the Convention.<sup>4</sup> The workshop's recommended to the Government, inter-alia:

- a. The workshop accepted the Draft Convention on the Protection of the Underwater Cultural Heritage in part and, because of some unsatisfactory articles affecting national interests, requested that the Attorney General Chambers review the contents of the Convention before any decision to ratify the Convention is made.

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<sup>3</sup> Dromgoole, 'The approach of the United Kingdom to the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001', paper delivered at *The Fifth World Archaeological Congress*, Washington D.C., 2003, p. 5.

<sup>4</sup> Workshop to discuss the Draft Convention on the Protection of the UNESCO Conventions on the Protection of the Underwater Cultural Heritage 2 June 2002, Johore, Malaysia.

- b. The workshop agreed that, while taking into account the views from all government agencies, more effort should be concentrated on the preservation of nation's underwater cultural heritage from threats.
- c. The workshop agreed to propose a specific procedure in carrying out research activities, exploration, excavations, salvage, and conservation of historic shipwrecks in order to ensure that such activities are carried out to recognised professional standards and according to specified *piawaian* (benchmarks)
- d. The workshop agreed to propose a special Convention at the national level for the purpose of reviewing and standardising existing laws by involving all government departments on the matter.
- e. The workshop agreed to propose that the scope and membership of the National Committee on the Management of Historic Wrecks be widen in order to achieve a more workable objectives and so that the Committee become more efficient.
- f. The workshop agreed to propose the creation of *pengkalan data maritim* (national maritime database) relating to underwater cultural heritage which will be coordinated by the National Committee on the Management of Historic Wrecks and which should become the source of information for all government agencies.
- g. The workshop agreed to propose the establishment of a special committee which involves all government agencies concerned and other interested parties in reviewing the implication of the article of the UNESCO Convention 2001.

Had these issues been fully explored by the government before the adoption of the 2001 UNESCO Convention, different stand might have been taken. The Department of Museums was particularly criticised for their failure to fully consider matters involving national security in maritime waters. They were of the view that whilst recognising the overall value of the UNESCO Convention, the Department of Museum should have



exercised more sensitivity in handling issues that will have impact on some outstanding matters yet to be resolved involving disputes in maritime waters in the Malacca Strait and the South China Sea. The two government departments, ie., the Department of Museums and the Marine Department, obviously had differing views on the matter and the special conference ended with a resolution calling for the government to reconsider its position regarding the Convention. Today, the government has yet to confirm its position over outstanding issues vis-à-vis the resolutions and recommendations of the workshop.

### 2.1.2 Adoption Short of Consensus

Over the years in which the drafting process took place, several working groups were assigned the task of formulating the definition of underwater cultural heritage, the scope of the convention, and some jurisdictional issues as well as other substantive legal matters. The focus of the debate surrounded on controversial issues such as the expansion of States jurisdiction, the *lex lata* - *lex loci* position between UNCLOS 1982 and the new Convention and the special status of warships/state vessels in relation to the scope and new obligations introduced under the new Convention.<sup>5</sup> The Convention failed to garner universal consensus due to disagreement over some of these issues and many of the major players in the field of maritime archaeology either abstained from voting or voted against its adoption.<sup>6</sup> The United States<sup>7</sup> for instance expressed concern that some of the relevant provisions under the new Convention create 'new rights for

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<sup>5</sup> J A R Nafziger, 'Historic Salvage Revisited', 31 *ODIL* (2000) 87.

<sup>6</sup> Norway, Russia, Venezuela and Turkey all voted against it whilst Belarus, Brazil, Colombia, Czech Republic, France, Germany, Greece, Iceland, Israel, Netherlands, Sweden, Paraguay, Switzerland, Uruguay and the United Kingdom all abstained from voting. Some of the industrialised countries that voted in favour of its adoption included Australia, Canada, China, Japan, New Zealand, the Republic of Korea. The United States, which was not a member of UNESCO at that time, voiced strong objection to its adoption. Australia voted in favour of its adoption.

<sup>7</sup> The U.S. participated as an observer and not as a member of UNESCO during the negotiations of the Convention.



coastal States in a manner that could alter the delicate balance of rights and interests' that was achieved through UNCLOS 1982. They felt that a number of provisions were ambiguous and inadequate in resolving issues relating to coastal states' jurisdiction as well as containing 'vague reference' to International law on top of the rules already established under UNCLOS 1982. The United States believes that 'only a broadly ratifiable agreement will actually contribute to the goal' of protecting underwater cultural heritage.<sup>8</sup> Overall, although its adoption was hailed a success, all the remaining unresolved issues leave one to wonder if its adoption was actually made in haste. Hence the possibility of the need to revisit some of its provisions in future if no positive results achieved as a result of the implementation of the new Convention.

## **2.2 Defining the Underwater Cultural Heritage**

### **2.2.1 Protection**

The term 'protection' under the new Convention is employed in several senses; firstly in terms of 'prohibition' of certain activities relating to underwater cultural heritage and secondly in terms of 'conservation' and 'preservation' of the heritage. Archaeologically speaking, the underwater cultural heritage needs protection from two kinds of problems: protection against unauthorized and destructive human interferences as well as protection against natural deterioration in its own environment. The use of the term protection thus carries different practical implications. Protecting the underwater cultural heritage from human interferences will raise issues relating to ownership, exploitation and disposal of the heritage. Protecting the heritage from further destruction or deterioration on the other hand raises issues relating to its conservation and preservation whether in situ or otherwise.

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<sup>8</sup> Blumberg R., 'US Concerns Regarding UNESCO Convention on Underwater Cultural Heritage' in *Contemporary Practice of the United States*, 96 *AJIL* (2002) 469-470.

### 2.2.2 Elements of the Term 'Underwater Cultural Heritage'

One of the most gruelling tasks during the drafting process of the UNESCO Convention was in comprehensively defining the term 'underwater cultural heritage'. There was great need for this. It must be borne in mind that the terms 'underwater', 'culture' as well as 'heritage', although obviously not inexplicable, are 'susceptible to subjective interpretation'<sup>9</sup> and it is a remarkable feat that they emerge amalgamated. The eventually agreed definition has its root in Recommendation 848 of the Council of Europe (1978), which led to the Draft European Convention on the Protection of the Underwater Cultural Heritage (1985)<sup>10</sup> that was never adopted by the negotiating parties.<sup>11</sup> The final text adopted in the 2001 UNESCO Convention however marks a significant departure from the European Draft Convention by introducing a more comprehensive approach to the defining of the subject of protection, that is, the protection of the 'site' on top of all else. The inclusion of the word 'site' as opposed to merely 'objects' as seen earlier in 1982 UNCLOS is a significant legal innovation as it ensures a more integrated approach towards the management of underwater cultural heritage.

The 1995 UNESCO Feasibility Study singles out 'historic shipwrecks' as 'the main body of material' that constitutes what is now known as 'underwater cultural heritage', thus narrowing down the potential scope of the Convention. Underwater cultural heritage other than historic wrecks, though smaller in number, are an equally significant component of the heritage that needs to come under the umbrella of protection.<sup>12</sup> The

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<sup>9</sup> Craig, J. S. Forrest, Defining 'Underwater Cultural Heritage', *INT'L J. NAUTICAL ARCHEOLOGY*, 31 (2002) p. 3, 3-11.

<sup>10</sup> Janet Blake, 'The protection of the underwater cultural heritage', *ICLQ* (1996) p. 820-822.

<sup>11</sup> O'Keefe and Nafziger, Strati, 1994, 391-418, Blake, Dromgoole, 2003, p.1, Strati, J. Blake, above, note 11, p. 820.

<sup>12</sup> According to the Feasibility study, other underwater cultural heritage would include: '(a) human settlements which has been submerged as a result of erosion or earthquake, (b) prehistoric lake settlement [and other] (c) prehistoric sites submerged by changes in sea levels'.

justification given in the feasibility study for not including these other categories of underwater cultural heritage was that there were only a small number of cases and these were already covered by respective national legislation.<sup>13</sup> While the final text of the 2001 UNESCO Convention recognizes underwater cultural heritage other than sunken historic wrecks, the latter is the cause of the failure to achieve consensus at UNESCO.

**(a) All Traces of Human Existence having a cultural, historical or archaeological character**

The 2001 UNESCO Convention defines ‘underwater cultural heritage’ as ‘all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years’ including the following:<sup>14</sup>

- (i) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context
- (ii) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context, and
- (iii) objects of prehistoric character

Other submerged objects including ‘pipelines and cables placed on the seabed’<sup>15</sup> as well as ‘installations other than pipelines and cables, placed on the seabed and still in use, shall not be considered as underwater cultural heritage’.<sup>16</sup> Technically, the phrase ‘all traces of human existence’ is broadly inclusive. Examples of traces of human existence

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<sup>13</sup> Paragraph 6 of the Feasibility Report cited examples of the Medieval town of Dunwich which was submerged due to erosion and Port Royal in Jamaica which disappeared because of an earthquake and also the prehistoric settlements in Switzerland.

<sup>14</sup> Art. 1(a) of the UNESCO Convention 2001.

<sup>15</sup> Art. 1(b), *Ibid.*

<sup>16</sup> Art. 1(c), *Ibid.*

as provided in article 1(a), (i), (ii) and (iii) above reflect the wide ranging possibilities of objects that could be considered as underwater cultural heritage.<sup>17</sup> The evidence of human existence can range from those of a pre-historic nature<sup>18</sup> to the heritage of the indigenous people as well as 21<sup>st</sup> century existence. However, recent traces of human existence are not of much concern here, and therefore, certain submerged objects like 'pipelines, cables and other installations whether used or unused which are laid in the sea-bed' are excluded from the scope of protection.<sup>19</sup>

Interestingly, Australia attempted a holistic approach to defining the heritage with the inclusion of the terms 'religious' or 'spiritual sites' in the definition but it did not garner much support. If spiritual sites include the resting place of human remains, the inclusion of the term 'human remains' is probably sufficient for that purpose. If the main concern is spiritual sites such as temples or religious buildings, then, it is submitted, that, probably the inclusion of the word 'religious' in the phrase 'all traces of human existence having cultural, historical or archaeological character' would have been more desirable, although one could simply argue that the expression 'site, building and structures' would cover all sorts of building whether religious or

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<sup>17</sup> *Draft European Convention* which defines the underwater cultural heritage as 'all remains and objects and any other *traces of human existence* located entirely or in part in the sea, lakes, rivers, canals, artificial reservoirs or other bodies of water, or in the tidal or other periodically flooded areas, or recovered from any such environment, or washed ashore, shall be considered as being part of the underwater cultural heritage, and are hereinafter referred to as 'underwater cultural property' (2) Underwater cultural property being at least 100 years old shall enjoy the protection provided by this Convention. However, any contracting State may provide that such property which is less than 100 years shall enjoy the same protection..' Also in the ILA Draft and Art. 1 of the European Convention on the Protection of the Archaeological Heritage 1969.

<sup>18</sup> Art. 1 (a) (iii) of UNESCO Convention 2001. These would include cable industry pipeline as well as other industrial and military installations. See; O'Keefe, 'Protection of the underwater cultural heritage: the legal framework of the Convention', paper presented at the Hong Kong Workshop, 2003, p.3.

<sup>19</sup> Art. 1 (b) and (c) of the UNESCO Convention 2001.

otherwise.<sup>20</sup> However, to curtail an unnecessarily over-broad coverage, the phrase ‘all traces of human existence’ is limited to those traces of human existence that are of ‘cultural, historical or archaeological character’, which have been underwater for at least 100 years.<sup>21</sup>

#### **(b) The 100 Years Cut-Off Age Rule**

There seems to be no scientific justification for the inclusion of the 100 years rule. Commentary to the 1994 ILA draft stated that the reason for this was merely ‘administrative convenience’ although it could also be ‘an efficient means for separating out material which is more likely to be to be important from what is less likely’ thus minimizing the responsibility of States for insignificant wrecks.<sup>22</sup> A proposed alternative draft article by the Sub-Committee of Seabed in 1973 suggested that ‘the recovery and disposal of wrecks and their contents more than 50 years old found in the Area shall be subject to regulation by the Authority without prejudice to the rights of the owner thereof.’<sup>23</sup> This age criterion never received consensus and in the end, it was dropped altogether. With little scientific evidence to support the necessity of a 100 or 50 years rule it is safe to conclude that the 2001 UNESCO Convention attempted to avoid this rather ‘overly inclusive’ definition of underwater cultural heritage, for the fear of unnecessarily covering insignificant discoveries simply because of their age alone.<sup>24</sup> The flip side of this is that some sunken shipwrecks could be considered to be historically and culturally significant despite the fact that they have been submerged for less than 100 years. The shipwreck of the RMS Titanic, for example, has attracted immense

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<sup>20</sup> In Malaysia, article 1 of the Antiquity Act 1976 for instance includes ‘temples or places of worship’ as part of monuments of archaeological or historical significance.

<sup>21</sup> The 1985 Draft European Convention did not provide for the 100 years submerge requirement.

<sup>22</sup> See also O’Keefe, *Shipwrecked Heritage: A commentary on the UNESCO Convention on Underwater Cultural Heritage*, 2003, pp. 41-45.

<sup>23</sup> A/CONF.62/WP.8/Part I (ISNT, 1975), Article 19, IV Off. Rec. 137, 140 (Chairman, First Committee) reproduced in Nordquist (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Vol. VI), 2002, p. 229

<sup>24</sup> Forrest, C., above, note 9, 8.

world-wide attention and she is no doubt a historical shipwreck in its own right despite being less than 100 years underwater today. The *Agreement on the Wreck of the Titanic between UK, Canada, France and the United States* recognised the *Titanic* as 'an underwater historical wreck of exceptional international importance, having a unique symbolic value'<sup>25</sup> and thus it will still be regarded and valued as underwater cultural heritage despite the length of time it has been submerged underwater. It would seem that other wrecks from the World War II would also be excluded from the purview of the Convention if the 100 years cut-off age is given too much weight, but then again, war wrecks require a distinct treatment altogether.<sup>26</sup>

**(c) Having 'Historical, Cultural and Archaeological Character'**

Whether or not this qualifying phrase is helpful is debatable. Some States argued that it would be more effective to focus on underwater cultural heritage that is culturally and historically significant instead of adhering to the 100 years cut-off age as it would mean that the number of wrecks falling under the jurisdiction of States would be too numerous and impractical.<sup>27</sup> O'Keefe argued that the phrase 'having cultural, historical or archaeological character' 'neither adds nor detracts from the already established scope of the Convention',<sup>28</sup> while Carducci was of the view that the word 'character' does give room for flexibility in interpretation but 'should be kept within the limits of bona-fide interpretation of the Convention.'<sup>29</sup> Strati analysed that in defining a much broader breadth of protection (the maximalist approach), emphasis should be made on 'all objects of cultural values' while the 'selective' or 'minimalist' approach would

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<sup>25</sup> Art. 2(b) of the *Titanic Agreement*.

<sup>26</sup> This will be considered below at para 2.3.8.

<sup>27</sup> See UNESCO Expert Meeting Reports. Also, U.K. Explanation of Vote (31 October 2001) on the absence of significance criterion.

<sup>28</sup> O'Keefe, *Protection and International Collaboration: the Legal Framework of the Convention*, Paper presented, Hong Kong, 2003.

<sup>29</sup> Guido Carducci, 'New developments in the law of the sea; the UNESCO Convention on the protection of the underwater cultural heritage 2001' *AJIL* (2002), p. 419-434, p. 423.



emphasise on 'objects that are of outstanding value or of real importance'.<sup>30</sup> The term 'character' is clearly an attempt to reflect conformity with 1982 UNCLOS despite the doubt surrounding the actual usefulness of it.

**(d) 'Cultural Heritage' and 'Cultural heritage of humankind'**

The UNESCO Convention 2001 is not the first, but it is one of the most recent International Conventions to employ the 'cultural heritage'<sup>31</sup> approach, as opposed to the private law focus of the term 'cultural property'.<sup>32</sup> The 2001 Convention does not in itself address the substantive aspects of the question of ownership of underwater cultural heritage since to do so would probably mean an impossibly longer journey for the Convention.<sup>33</sup> However, within the term 'underwater cultural heritage' itself one might find guidance on how States approach issues relating to ownership in a domestic context. Underwater cultural heritage is not a mere property. In the domain of international cultural heritage protection it is a 'cultural heritage' distinct from the notion 'cultural property'. Over the years, there has been a definite shift from the use of

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<sup>30</sup> Strati, above, p. 20.

<sup>31</sup> The following international and regional conventions also employ the same term and approach; the 1969 *European Convention on the Protection of the Archaeological Heritage*, the 1985 *Convention for the Protection of the Architectural Heritage of Europe*, *Convention on the Protection of the World Cultural and Natural Heritage* 1972, the *ASEAN Declaration on Cultural Heritage* 2000, and more recently the *UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage* 2003 as well as the *UNESCO Declaration Concerning the Intentional Destruction of Cultural Heritage* 2003.

<sup>32</sup> The 'cultural property' approach first appeared in the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 and was also employed by UNESCO in the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, the 1999 Second Protocol to the Hague Convention (1954) as well as the 1993 Commonwealth Scheme on the Protection of the Material Cultural Heritage. Some International instruments, however, refrain from employing these two battling concepts and instead, choose to be more specific. Thus the UNIDROIT *Convention on Stolen or Illegally Exported Cultural Objects* 1995 employs the term 'cultural objects' and 'cultural materials', and a prospectively, the *Draft Principles for Cooperation in the Mutual Protection and Transfer of Cultural Material* currently being prepared by the International Law Association's Cultural Heritage Law Committee.

<sup>33</sup> See; Sarah Dromgoole, 'Editor's Introduction', p. xxxii, in, Dromgoole (ed.), *The Protection of the Underwater Cultural Heritage: National Perspectives in the Light of the UNESCO Convention 2001*, 2<sup>nd</sup> Edt., Martinus Nijhoff, 2006, Leiden.



the term 'cultural property'<sup>34</sup> to 'cultural heritage' as a legal tool governing the movement of objects of historical and cultural significance.<sup>35</sup> The term 'property' is less attractive in the domain of cultural heritage protection for 'it is not sufficiently broad enough to encompass the range of items for which protection is sought' while the notion 'heritage' is seen as the better alternative, free from 'civil or common law legacies of property values' and the term 'incorporates concepts of duty to preserve and protect'.<sup>36</sup>

However, defining 'cultural heritage' is no mean feat. O'Keefe and Prott argued that: 'if culture consists "of learned modes of behaviour and its material manifestations, socially transmitted from one generation to the next and from one society or individual to another",<sup>37</sup> then the cultural heritage consists of as much of those activities and the objects which give us evidence of them as we perceive."<sup>38</sup> The difficulty here is that; cultural property that is part of cultural heritage has come to mean different things to different people. Its meaning has also changed over time – 'heritage' - once referred to as pertaining 'exclusively to the monumental remains of cultures... has gradually come

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<sup>34</sup> Definitions of 'cultural property' can be found in the *Hague Convention on the Protection of Cultural Heritage in the Event of Armed Conflict* 1954; Art 1 of the 1970 UNESCO Convention which also provides a list of items that could be categorised as cultural property.

<sup>35</sup> O Keefe, P. J., and Prott, L. V., *Law and the Cultural Heritage Vol 1 Discoveries and Excavations*, 1984, p. 7, Prot. L., O'Keefe, P.J., Cultural heritage or cultural property?', *Int'l Journal of Cultural Property*, Vol. 1 1992, p. 307, Janet Blake, 'On defining cultural heritage', *ICLQ*, Vol. 49 2000, p. 61; Roger O'Keefe, 'The Meaning of Cultural Property under the 1954 Hague Convention', *Netherlands International Law Review*, Vol. XLVI, 1999, p. 26; John Henry Merryman, 'Two Ways of Thinking about Cultural Property', *American Journal of International Law* (1986) p. 831, Merryman, 'The Nation and the Object', *International Journal of Cultural Property* (1994) p. 61.

<sup>36</sup> Strati, above, p. 20, note 1.

<sup>37</sup> Clarke, D.L., *Analytical Archaeology*, Methuen, London, 1968, p. 19.

<sup>38</sup> O Keefe, P. J., and Prott, L. V., *Law and the Cultural Heritage Vol 1 Discoveries and Excavations*, 1984, p. 7, Prot. L., O'Keefe, P.J., Cultural heritage or cultural property?', *Int'l Journal of Cultural Property*, Vol. 1 1992, p. 307, Janet Blake, 'On defining cultural heritage', *ICLQ*, Vol. 49 2000, p. 61; L. V. Prott, 'Legal Protection of the Cultural Heritage', *Recueil des Cours, Collected Courses of the Hague Academy of International Law*, 1989, (1990) p. 224.

to include new categories such as the intangible, ethnographic or industrial heritage.<sup>39</sup> Although the term 'cultural heritage' may not be 'susceptible to exacting interpretation',<sup>40</sup> there is an obvious need to adequately define the context in which cultural heritage may appear. A convenient way to do this is by first classifying it into the tangible and the intangible form of heritage.<sup>41</sup> The next task, a more difficult one, is to determine the economic and historical values of a particular heritage. In order to determine the degree of significance of a particular cultural heritage within a society, it might be useful to categorise cultural heritage into 'national heritage', 'local heritage', 'common cultural heritage', 'regional cultural heritage' and 'universal cultural heritage' in order to determine their degree of significance in terms of their geographical value.<sup>42</sup>

Frigo argued that 'cultural heritage of mankind' is an 'abstract concept' whereas 'cultural property' is more concrete and less likely to lead to an abstract interpretation since 'it is only through the protection of the material and concrete evidence of culture (i.e. the property) that the main goal of protecting cultural heritage might be reached.'<sup>43</sup> In its simplest sense, the notion of 'property' denotes ownership whilst 'heritage', although it may include property ownership, it implies a lack thereof. However, it is in this sense that 'cultural property comprising mankind's common cultural heritage

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<sup>39</sup> UNESCO Website information (undated) at [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=2185&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=2185&URL_DO=DO_TOPIC&URL_SECTION=201.html) (last visited on 21/09/2005).

<sup>40</sup> Forrest, C.J., above, note 9, 3.

<sup>41</sup> Art. 2(1) of the UNESCO Convention on the Protection of the Intangible Cultural Heritage 2003 defines intangible heritage as 'the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.'

<sup>42</sup> O'Keefe and Prott, Vol. III, p. 26-36. They argued that 'national heritage' means protection of 'national treasures' and 'other cultural materials should be freely handled and traded' and 'States may also wish to adopt specific legislation on 'local heritage' in order to control movement of cultural heritage within a country 'for the retention of significant bodies of local cultural material for peoples in the area of origin'.

<sup>43</sup> Manlio Frigo, *'Cultural Property v. cultural heritage: a battle of concepts in International law'*, IRRIC, Vol. 86 No. 854 (June 2004), p. 377.

should not be the province of any one state.<sup>44</sup> It is possible to see underwater cultural heritage as a cultural property because it is both tangible and can be traded as cultural goods, but the application of the term 'cultural heritage' is what would save underwater cultural heritage from disappearing into the open market.

Consequent to the notion 'cultural heritage', the 2001 Convention recognizes that the underwater cultural heritage is 'an integral part of the *cultural heritage of humanity* and a particularly important element in the history of the peoples, nations, and their relations with each other concerning their *common heritage*.'<sup>45</sup> The phrase 'common heritage' is mostly found in the 1979 Moon Treaty and 1982 UNCLOS. The environmentalists use this term 'to refer to either all the living and non-living resources of nature or to the global environment as an ecological entity'<sup>46</sup> but the 1982 UNCLOS has effectively extended this notion of 'common heritage of mankind' to the underwater cultural heritage, which is neither a living nor non-living resource.<sup>47</sup> The phrase 'common heritage' implies the 'common interest' of mankind as beneficiary of the heritage. Experts are of the view that the assertion of 'common interest' over a resource does not mean the 'internalisation' of the 'ownership of resources.'<sup>48</sup> In this sense, underwater cultural heritage is probably better regarded as a 'common interest of mankind' rather than a 'cultural heritage of mankind'. In both 1982 UNCLOS and the Moon Treaty, the application of this concept over resources of the moon and the areas of the ocean beyond the national jurisdiction means that the resources 'cannot be exploited to the exclusive sovereignty of states but must be conserved and exploited for the benefit of

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<sup>44</sup> Mark F. Lindsay, 'The Recovery Of Cultural Artefacts: The Legacy of Our Archaeological Heritage', *W. RES. J. INT'L L.* (1990) 165, 173.

<sup>45</sup> Preamble, 2001 UNESCO Convention.

<sup>46</sup> Full discussion on the application of this concept in various areas of laws, see; Birnie and Boyle, *International Law and the Environment*, 2<sup>nd</sup> Edn., 143-144, 559, 605, 755.

<sup>47</sup> Considered earlier in Ch. 1.

<sup>48</sup> Birnie and Boyle, above, note 46, p. 144.

all, without discrimination'.<sup>49</sup> Thus, to consider underwater cultural heritage as a 'common heritage of mankind' in the same context as the exploitation of the resources in the deep seabed or the moon would be undesirable approach since, for instance, an underwater cultural heritage located within the territorial sovereignty of a State can never be either *res nullius* or *res communis*. Inherent 'elements and consequences' of the notion of 'common heritage of mankind' are;

the notion of trust and trustees; indivisibility of the heritage; the regulation of the use of that heritage by the international community; the most appropriate equitable application of benefits obtained from the exploration, use and exploitation of this area to the developing countries; freedom of access and use by all States; and principle of peaceful use.<sup>50</sup>

Within the context of the discovery of 'archaeological or historical' objects as used under UNCLOS 1982, it would seem impossible to truly reconcile the element 'indivisibility of heritage' with the preservation of underwater cultural heritage, while the notion of 'trust and trustee' takes centre stage above all elements mentioned above. Thus, the most that can be said regarding States' obligation to protect underwater cultural heritage both under UNCLOS articles as well as the 2001 Convention is that of a trustee to the heritage for the benefit of mankind. Other than this, the implications of the notion 'common heritage of mankind' remain unclear and at best it is merely 'international political jargon'<sup>51</sup> and 'hortatory'.<sup>52</sup>

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<sup>49</sup> Ibid, p. 143.

<sup>50</sup> Sea-Bed Committee Report, 1969, Part II, p. 14.

<sup>51</sup> J. Greenfield, above, p. 255.

<sup>52</sup> Birnie and Boyle, note 47, p. 144.

## 2.3 Jurisdictional Issues

### 2.3.1 Question of Expansion of Coastal State Jurisdiction

The issue of expansion of coastal States' jurisdiction<sup>53</sup> brought about by the 2001 UNESCO Convention departing from those established under 1982 UNCLOS was the pinnacle of controversy during the negotiating process of the 2001 Convention and it was also a major reason for the failure at UNESCO to achieve a universal consensus for its adoption. It is therefore crucial to examine the nature of the expansion and whether such an expansion, which allegedly departs from the already established position under 1982 UNCLOS, is necessary. Should this development be viewed in the negative, running into discord with the 1982 UNCLOS as the world 'Constitution for the Ocean'<sup>54</sup> or should it be seen as a positive legal development which amplifies the basic legal regime provided under the 1982 UNCLOS? The objection to the expansion of coastal state's jurisdiction as seen in the 2001 UNESCO Convention is not the first of its kind in the development of the international law of the sea. During the first UN Conference on the Law of the Sea in 1958, there were attempts by some States, namely the United States, United Kingdom, France, Holland and (the then) West Germany, to preserve the three mile rules in drawing the breadth of coastal States' territorial sea. It continued in 1960 and was finally discarded through UNCLOS 1982. The Soviet Block at that time did not make any objection to the development as they felt that their interest was better served by the expansion of the territorial limit. The United States objected to the extension of 3 mile rule in the following terms:

Three miles was the sole breadth of territorial sea on which there had been anything like common agreement, and was a time tested principle which offered the greatest opportunity to all nations without exception.

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<sup>53</sup> Legal commentators have used different names for the same thing; 'creeping jurisdiction', 'extension', 'expansion' or 'horror jurisdictionis'.

<sup>54</sup> For a discussion on the nature of the 1982 UNCLOS as the world's constitution for the oceans and its pre-eminence over other treaties, see; Boyle, A., 'Further Development of the Law of the Sea Convention: Mechanisms for Change', (2005) *Int'l & Comp. L. Q.*, pp. 566-567.

Unilateral acts by States claiming a greater breadth of territorial sea were not sanctioned by international law, and conflicted with the universally accepted principle of freedom of the seas... there was no obligation on the part of the States adhering to the three mile rule to recognise claims of other States to a greater breadth.<sup>55</sup>

The attitude of States towards the bold development of territorial sea from 3 to 12 nautical miles is very much the result of political will, or the lack thereof, of the States concerned.<sup>56</sup> The same can be said for the attitudes of States towards the nature of expansion of coastal State jurisdiction under the 2001 UNESCO Convention. Group 77, which supported the extension of the territorial limits during the Geneva Conventions also voted in favour of the adoption of the 2001 UNESCO Convention. Concerns over expansion of coastal State's jurisdiction under the 2001 UNESCO Convention arose under articles 7, 8, 9, 10, 11 and 12 of the Convention.<sup>57</sup> However, it must be noted while scepticism over an expansion of Coastal States jurisdiction became one of the reasons why countries such as Norway, Sweden and the United States not to accept the 2001 Convention, there are other countries, which felt that the Convention 'diminution of Coastal States rights and its substitution of a complex and potentially difficult to enforce regime of consultation and coordination' as a reason not to accept the Convention.<sup>58</sup>

The jurisdictional zones established under the Convention, however, do conform to the jurisdictional zones as established under the 1982 UNCLOS; i.e. territorial sea,

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<sup>55</sup> Arthur Dean, *UN Conference on the Law of the Sea*, Official Records, vol. II, Plenary Meetings, UN Doc. A/CONF.13/38 (Geneva 1958), p. 34. For an extensive analysis of the development of the three mile rule, see: Shigeru Oda, 'The Extent of the Territorial Sea: Some Analysis of the Geneva Conferences and Recent Developments', *JAPANESE ANNUAL OF INTERNATIONAL LAW* (1962) 8.

<sup>56</sup> According to Melo Lecaros, 'the rise and development of the law of the sea had been prompted by one single factor: interest. Political or economic interest had always prevailed in defining the law of the sea through the centuries'.

<sup>57</sup> These will be dealt with in subsequent sections.

<sup>58</sup> See: Nafziger, Introduction, in Dromgoole, S., 2006.

contiguous zone, exclusive economic zone, continental shelf and the 'area'. The International Law Association draft contains proposal for the establishment of a 'cultural heritage zone'. It is arguably the case that the creation of a cultural heritage zone on top of existing jurisdictional zones as established under UNCLOS 1982, could be useful in further outlining the jurisdiction of the coastal state as it would explicitly grant the coastal State 'jurisdiction over activities *affecting* the underwater cultural heritage'<sup>59</sup> by compelling States 'to take measures to ensure that within [the zone] activities affecting underwater cultural heritage comply at a minimum with the provisions of the Charter'.<sup>60</sup> However, the proposal was rejected as it would clearly be an expansion of coastal States' jurisdiction.

### 2.3.2 Relationship between the 2001 UNESCO Convention and the 1982 UNCLOS

Successful integration between the 1982 UNCLOS and the 2001 UNESCO Convention, no matter how difficult to achieve, is necessary for the survival of underwater cultural heritage. The relationship between the two treaties can be evaluated from various perspectives but it is particularly important in respect of the differences between the two treaties on the nature and extent of States' jurisdiction in various maritime zones. One aspect of the relationship is the status of UNCLOS 1982 as the *lex parentis* to the 2001 UNESCO Convention, with some writers labeling them as *lex generalis* and *lex specialis* respectively.<sup>61</sup> First, the incompleteness of UNCLOS 1982 helped shape the form of the latter Convention. One of the initial issues considered in the UNESCO feasibility study was the 'form' of the new convention. The feasibility study admitted that UNCLOS 1982 did not deal adequately with the necessary protection as it was not within the ambit of the Convention's general focus to be 'concerned with the protection

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<sup>59</sup> Art. 5(1) of the initial ILA Draft.

<sup>60</sup> Art. 5(2), *Ibid.*

<sup>61</sup> See; Guido Carducci, 'New development in the law of the sea: the UNESCO Convention on the Protection of the Underwater Cultural Heritage', *AJIL* (2002) 419, 420, and, Boyle, A., 'Further Development of the Law of the Sea Convention: Mechanisms for Change', *Int'l & Comp. L. Q.* Vol. 54, (2005) 578-584.



of the cultural heritage'.<sup>62</sup> It is more concerned with 'the general rules on the law of the sea and with the development of rules on the exploitation of its economic resources'.<sup>63</sup> Consequently, it was felt that the new convention should not be in the form of an amendment or a protocol to UNCLOS 1982 and instead should stand on its own as an international Convention,<sup>64</sup> thus enjoying autonomy.<sup>65</sup> However, this raises concerns over the implications of creating a new Convention that may depart from certain established legal positions under the 1982 UNCLOS. The 2001 UNESCO Convention thus makes direct reference to the 1982 UNCLOS, ensuring conformity and consistency with established international laws particularly those actually deriving from 1982 UNCLOS.<sup>66</sup> Article 3 of the new convention expressly explains this special relationship;

Nothing in this Convention shall prejudice the rights, jurisdiction and duties of States under international law, including the United Nations Convention on the Law of the Sea. This Convention shall be interpreted and applied in the context of and in a manner consistent with international law, including the United Nations Convention on the Law of the Sea.

The final text of article 3 is the result of a compromise to ensure the primacy of UNCLOS over the 2001 UNESCO Convention and yet it failed to gather consensus

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<sup>62</sup> UNESCO Feasibility Study, UNESCO 146 EX/27.

<sup>63</sup> Ibid.

<sup>64</sup> Above, note 61, at p. 8 paragraph 41. Interestingly, Norway proposed the creation of an implementation agreement to UNCLOS similar to the 1995 Agreement on Straddling Fish Stocks and Highly Migratory Fish Stock but this view was rejected.

<sup>65</sup> Carducci, above, note 62, p. 420.

<sup>66</sup> For debates and concerns over the matter, see; Preliminary Study on the Advisability of Preparing an international Instrument for the Protection of the Underwater Cultural Heritage, Annex, Paris, 4 October 1995 (UNESCO doc. 28C/39); Report by the Director-General on the Finding of the Meeting of Experts concerning the Preparation of an International Instrument for the Protection of the Underwater Cultural Heritage, Paris, 14 May 1997 (UNESCO doc. 151 EX/10 Add.); United Nations, General Assembly, Resolution on the Ocean and the Law of the Sea, U.N. doc. A/Res/53/32, 6 January 1999, para. 20 and United Nations, General Assembly, Resolution on the Ocean and the Law of the Sea, U.N. doc. A/Res/54/31, 18 January 2000, para. 30.



during the Final Expert Meeting. It will indeed be very interesting to see how the second sentence in the above article develops in future, particularly, since UNCLOS 1982 does not provide a comprehensive regime of protection for underwater cultural heritage, whether there can be any room for departure from UNCLOS 1982 in a way that does not 'disturb the delicate balance' achieved through that agreement. One possible solution is by taking recourse to article 311 of UNCLOS 1982, which provides that:

Two or more State Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective of the object purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other State Parties of their rights or the performance of their obligations under this Convention.

The phrase 'may conclude agreements' in the above provision refers to potential future agreements 'impinging upon matters for which the Law of the Sea Convention also provides'.<sup>67</sup> Article 311 is thus one of those mechanisms that allow the further evolution of the law of the sea, which would otherwise render UNCLOS obsolete when faced with legitimate need for some modifications to existing legal regime.<sup>68</sup>

However, the Department of Hydrography<sup>69</sup> is of the view that although the article 2(8) and 3 of the 2001 Convention guarantees conformity to UNCLOS 1982, there are

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<sup>67</sup> Rau, M., 'The UNESCO Convention on Underwater Cultural Heritage', Max Planck UNYB 6 (2002), p. 426.

<sup>68</sup> Boyle, A., above, at note 63, p. 563, and Boyle, A. and Chinkin, C., *The making of International Law*, 2007, pp. 241-247.

<sup>69</sup> Views in this section is provided by Lt. Commander Mohd. Nasir Fadzir, TLDLM, Kuala Lumpur, June 2002.

difficulties in reconciling certain issues. Firstly, while article 6 encourages States to enter into bilateral, regional or multilateral cooperation in protecting the heritage, it does not specify clearly which countries must be involved. The Department felt that the article has implications in the conflicting claims in the exclusive economic zones involving Thailand, Vietnam, Singapore, Brunei and Indonesia.<sup>70</sup> Secondly, article 19, was viewed as giving the opportunity to foreign State in conducting other research in the national territory masquerading as underwater cultural heritage research while Rule 10 of the Annex Rules was thought to be insufficiently drafted because it does not consider aspects relating to navigational safety in national waters. Other articles that were considered unacceptable to the Department are articles 11, 12 and 22.<sup>71</sup>

### **2.3.3 Jurisdiction in Inland Waters not of Maritime Character**

The 2001 UNESCO Convention does not apply to underwater cultural heritage found in inland waters. Since most States have some kind of legislation protecting the archaeological or historical objects found inland,<sup>72</sup> the question of jurisdiction over inland waters are therefore beyond the scope of the 2001 UNESCO Convention. However, States are encouraged to apply the Annexed Rules of the Convention over cultural heritage located beneath inland waters that are 'not of maritime character'.<sup>73</sup> Such encouragement for States to apply the rules to a jurisdiction falling outside the scope of the Convention is a novel effort to ensure that States apply the rules as a standard practice in regulating activities directed at underwater cultural heritage.<sup>74</sup> Why would a State not apply the same rules relating to underwater cultural heritage in

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<sup>70</sup> Particularly those involving Pulau Batu Puteh, Patinggi Ali, Semarang, Pulau Layang, Terumbu Siput, Terumbu Ubi, Terumbu Mantanani, Terumbu Peninjau, Pulau Ligitan and Pulau Sipadan.

<sup>71</sup> These articles will be examined below.

<sup>72</sup> Although the extent and the effectiveness of this regime relating to underwater cultural heritage may be questionable as was the case with the repealed Antiquities Act 1976. This will be discussed in Chapter 4.

<sup>73</sup> Article 28 of UNESCO Convention 2001.

<sup>74</sup> Some countries (UK, USA) have expressed willingness to apply these Rules despite their objection to other issues relating to the Convention.

inland waters as they would to underwater cultural heritage found in other maritime waters? Some delegates in the second expert meeting raised this issue and argued that it would be inconsistent on the part of States 'to advocate the application of the Rules of the Annex in their exclusive economic zone and continental shelf, while rejecting a clear commitment in the maritime areas in which their jurisdiction was not disputed'.<sup>75</sup> One commentator argued that 'the annex would attract many ratifying nations and would quickly be recognized as part of customary international law' and this would 'avert difficulties when an occupying power is undertaking large-scale construction projects and when the relevant domestic law is uncertain. Widespread acceptance would do much to assure protection for the world's cultural heritage if comparable situations were to arise in future.'<sup>76</sup>

#### **2.3.4 Internal Waters, Archipelagic Waters and Territorial Sea**

The extent of coastal states' jurisdiction in their internal waters, archipelagic waters or territorial sea over the underwater cultural heritage is spelt out under article 7 of the Convention. The article provides that 'States parties, in the exercise of their sovereignty, have the exclusive right to regulate and authorise activities directed at underwater cultural heritage in their internal waters, archipelagic waters and territorial sea.'<sup>77</sup> The article strengthens the principle of territorial sovereignty of the coastal state in these zones as established under UNCLOS 1982. Consequently, the Coastal State reserves the right to be the independent guardian of the heritage concerned and therefore not obligated to follow the procedures of consultation with any other States as is the case for underwater cultural heritage found in exclusive economic zones or on continental shelf.<sup>78</sup> The exception being, sunken state vessels found in archipelagic and territorial

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<sup>75</sup> Final Report of the 2<sup>nd</sup> Meeting, para 29.

<sup>76</sup> Patty Gerstenblith, 'Protecting cultural heritage: International law after the war in Iraq', paper presented at the conference on the protection of cultural heritage in occupied territories.

<sup>77</sup> Art. 7(1) UNESCO Convention 2001.

<sup>78</sup> Para 3.5 & 3.6 below.

waters of the Coastal State. It was generally felt that these State vessels would be subject to the laws of sovereign immunity and therefore, in this regard, States are called to cooperate 'on the best methods of protecting States vessels and aircraft' as well as to 'inform the flag State Party to this Convention' and 'other States with a verifiable link, especially a cultural, historical or archaeological link, with respect to the discovery of such identifiable State vessels and aircraft.'<sup>79</sup> Despite the obligation (which some writers argue as not obligatory) imposed on the Coastal State 'to inform' the flag State with a view to possibly consulting them, it is clear that there is an absence of a requirement of flag state consent as far as activities directed at sunken State vessels located in the territorial or archipelagic waters of Coastal States are concerned. The absence such requirement thus became one of the reasons why certain major maritime countries such as the United States and the United Kingdom refused to accept the Convention. The drafting history of the 2001 Convention's articles on the treatment of sunken state vessels shows the intricacies of the issues involved.<sup>80</sup>

A Coastal State's right as a guardian of underwater cultural heritage in its territorial or archipelagic waters does not pass on to another State which has verifiable link to such heritage. After all, the coastal state has the obligation to ensure, whether individually or jointly with other States, to 'take all appropriate measures in conformity with this Convention and with international law that are necessary to protect the underwater cultural heritage, using for this purpose the best practicable means at their disposal and in accordance with their capabilities.'<sup>81</sup> The contents of these measures must not be in conflict with 'other international agreements and rules of international law regarding the protection of underwater cultural heritage' and are to be found in the Annex Rules<sup>82</sup>

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<sup>79</sup> Art. 7(3), *Ibid.* However, it is clear from the language of the provision that such requirement is not obligatory.

<sup>80</sup> Boesten, pp. 141-145.

<sup>81</sup> Art. 2(4) of the 2001 Convention.

<sup>82</sup> Art. 7(2).

as well as the objectives and principles enunciated in article 2 of the Convention. The phrase 'without prejudice to other international agreements and rules of international law', though considered a necessity by the drafters of the Convention, lends a degree of complication. The phrase 'other international agreements' could be easily understood as any bilateral, or some multilateral, agreements between a handful of States pertaining to a particular discovery, for example, the agreements for the wreck of the *Titanic*, the agreement for the wreck of the French vessel *La Belle* and the agreement between Australia and Netherlands over the Dutch wrecks.

However, what exactly are these 'rules of international law regarding the protection of underwater cultural heritage' and are they in tandem with the 2001 Convention? This is unclear. Reference to 'other rules of international law' appears a number of times in the Convention.<sup>83</sup> Such reference is not unique to the Convention as it also appears in the 1982 UNCLOS in the provisions relating to the protection of underwater cultural heritage and in several other contexts; the Preamble, articles pertaining to the various aspects of territorial sea,<sup>84</sup> straits,<sup>85</sup> archipelagic sea lanes,<sup>86</sup> exclusive economic zones,<sup>87</sup> continental shelf,<sup>88</sup> high seas,<sup>89</sup> the Area,<sup>90</sup> as well as in articles pertaining to dispute settlement.<sup>91</sup> Other than in 1982 UNCLOS, such phrase has also made an appearance in the 1958 Geneva Convention on the High Seas Convention 1958.

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<sup>83</sup> Preamble, art. 2(4), 2(8), 3, 7(2), 10(2), 10(4), 10(6) and 19(4) of the Convention.

<sup>84</sup> Art. 2(3), 19, 21, 31 UNCLOS 1982.

<sup>85</sup> Art. 34(2), Ibid.

<sup>86</sup> Art. 52(1).

<sup>87</sup> Art. 58(1) and 58(3).

<sup>88</sup> Art. 78.

<sup>89</sup> Art. 87(1).

<sup>90</sup> Art. 138.

<sup>91</sup> Art. 293.

### 2.3.5 Contiguous Zone

Article 8 of the Convention provides that States '*may* regulate and authorize activities directed at the underwater cultural heritage within their contiguous zone.' The terms under which a coastal State exercises its obligation under this article is 'without prejudice' to the implementation of the obligations specified under article 9 and 10 the Convention, that is, the duties of the relevant parties over the reporting and notification of the discovery of underwater cultural heritage in the exclusive economic zone and on the continental shelf,<sup>92</sup> as well as in regulating activities directed at the underwater heritage found in the exclusive economic zone and on the continental shelf.<sup>93</sup> More importantly, article 8 is linked to 1982 UNCLOS in that the exercise of jurisdiction by States must be in full conformity with Article 303(2) of UNCLOS 1982.<sup>94</sup>

What the coastal States need to do is to regulate or to authorise activities directed at underwater cultural heritage within their contiguous zone in accordance with the principles and rules prescribed in the Convention in ensuring consistency of State practice in the application of acceptable international standard in maritime archaeology. States must also ensure that the authorization of such activities is not contrary to the objectives of the Convention. For this reason, it is vital that those activities are carried out under strict compliance with the Annex Rules and since the language of the provision is that States '*may* regulate and authorise activities directed at underwater cultural heritage', not every discovery of underwater cultural heritage need be followed by physical recovery of the heritage. In situ preservation is still the first preferable method of protection regardless of the maritime zone in which it was found.<sup>95</sup>

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<sup>92</sup> Art. 9 UNESCO Convention 2001.

<sup>93</sup> Art. 10.

<sup>94</sup> Art. 8 of 2001 UNESCO Convention. See; Chapter 1 on Coastal State jurisdiction in contiguous zone under 303(2) and 33 of UNCLOS 1982.

<sup>95</sup> Rule 1 of the Annex Rules.

### 2.3.6 Exclusive Economic Zone and Continental Shelf

Since coastal States do not normally exercise jurisdiction over underwater cultural heritage in areas beyond their territorial sea and contiguous zone, all States bear 'responsibility' over the protection of underwater cultural heritage in the exclusive economic zone, on the continental shelf as well as the Area, be it the coastal State or other States which have some vested interest over the heritage concerned.<sup>96</sup> Article 9 contains rules that will ensure the effectiveness of the UNESCO Convention. The article makes it an obligation for the coastal State to require any vessel flying its flag which 'discovers or intends to engage in activities directed at underwater cultural heritage located in its exclusive economic zone or on its Continental Shelf of another State Party' to report such discovery or activity to that State,<sup>97</sup> or by requiring its 'national or master of the vessel to report such discovery or activity to it and shall ensure the rapid and effective transmission of such reports to all other States Parties.'<sup>98</sup> Control mechanisms such as this one requires efficient technical implementation but how this mechanism is to be implemented is not further outlined under the Convention. The Convention simply leaves it to the discretion of the States concerned by merely requiring the States 'to declare the manner in which reports will be transmitted' upon the deposit of the respective 'instrument of ratification, acceptance, approval or accession'.<sup>99</sup> To date, none of the States, which have ratified the Convention, have made any such declaration. It is vital that the duties to consult, report and notify co-exist and complement one another within the exclusive economic zone and on the continental shelf. The duty to consult is spelt out in the following terms:

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<sup>96</sup> Art. 9(1) and 11(1) of 2001 UNESCO Convention.

<sup>97</sup> Art. 9(b)(1) *ibid.*

<sup>98</sup> Art. 9(b)(2), *ibid.*

<sup>99</sup> Art. 9(2), *ibid.*



Any State Party may declare to the State Party in whose exclusive economic zone or on whose continental shelf the underwater cultural heritage is located its interest in being consulted on how to ensure the effective protection of that underwater cultural heritage. Such declaration shall be based on a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned.<sup>100</sup>

It is up to the States concerned how they proceed from thereon, but quite possibly States proceed with special agreements between them. Thus an act to consult other States, which may have an interest in the subject matter, denotes willingness on the part of the States to cooperate for the common benefit and interest of all.<sup>101</sup> The duty of the coordinating State is specifically 'to implement measures of protection' that have been established and agreed upon by the consulting States including the coordinating State.<sup>102</sup> Although it is the duty of the coordinating State to implement those agreed measures, the Convention is also flexible on this matter, allowing another State Party to implement those measures if so agreed by the consulting States and the coordinating State.<sup>103</sup> In addition, coordinating State is to 'issue all necessary authorisations for such agreed measures' unless it was agreed by the consulting States which include the coordinating State, agree that another State Party shall issue those authorisation'.<sup>104</sup> In addition, 'the coordinating State shall act on behalf of the States Parties as a whole and not in its own interest.'<sup>105</sup> Thus, it is clear that the execution of these duties would result in 'cooperation' amongst State parties. This approach - the three co-existing duties -

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<sup>100</sup> Art. 9(5) of the 2001 UNESCO Convention.

<sup>101</sup> In a Resolution adopted by the UN General Assembly in 1998, (A/RES/52/521 15 September 1998) in relation to the Agreement on Cooperation and the Relationship Between the United Nations and the International Tribunal of the Law of the Sea, the duty to cooperate and to coordinate is ascribed to the duty to 'consult and cooperate, whenever appropriate, on matters of mutual concern' (art. 2(a)) and to 'pursue, whenever appropriate, initiatives to coordinate their activities.' (art. 2(b)).

<sup>102</sup> Art. 10(5) (a).

<sup>103</sup> Ibid.

<sup>104</sup> Art. 10(5)(b) of the 2001 UNESCO Convention.

<sup>105</sup> Art. 10(6), *ibid.*



form a brilliant strategy in negating the alleged 'creeping jurisdiction' of the coastal State and in ensuring transparency in the conduct of the littoral States in relation to the preservation or other activities directed towards such heritage.

### 2.3.7 The Area

In the area beyond the coastal State jurisdiction, the Area, all States Parties to the 2001 UNESCO Convention bear responsibility over underwater cultural heritage by taking actions that are in conformity with the 2001 UNESCO Convention and article 149 of UNCLOS 1982.<sup>106</sup> The remit of article 149 of the 1982 UNCLOS is expanded through articles 11 and 12 of the UNESCO Convention. Firstly, and quite importantly, the UNESCO Convention imposes on any 'national, or a vessel flying the flag of a State Party' which 'discovers or intends to engage in activities directed at underwater cultural heritage located in the Area' is 'to report such discovery or activity to it'. As is the case with article 9(5), as a proactive measure, article 11(4) provides that a State Party may also declare 'its interest in being consulted on how to ensure the effective protection of that underwater cultural heritage' on the basis of a 'verifiable link' to the heritage concerned with due regard to the 'preferential rights of States of cultural, historical or archaeological origin'. Article 11 of the 2001 UNESCO Convention thus remedies the loopholes under UNCLOS in a number of ways; by making certain the role played by the International Seabed Authority in the Area over any activities relating to underwater cultural heritage and by making it an obligation to report the discovery of an underwater cultural heritage. Article 12 on the other hand clarifies how the protection of underwater cultural heritage is to be implemented in the Area, addressing the ambiguity found in article 149 of the 1982 UNCLOS. Here, the interconnecting duties to report, consult and coordinate become crucial factors to the

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<sup>106</sup> Art. 11, *ibid.*

success of the implementation of measures relating to the preservation or disposal of this heritage.

### 2.3.8 Exception to Warships and State Vessels

The 2001 UNESCO Convention relieves the duty to report the discovery of underwater cultural heritage by those operating State vessels or warships in the exclusive economic zone. This is on the basis that the operation of these vessels have nothing to do with the search for or discovery of such heritage and, quite understandably, that the operation of these State vessels involve sensitive military information. This is, however, a very different issue to the question of sunken State vessels and warships, which have become underwater cultural heritage themselves. In both scenarios, however, the special status of warships and State vessels under the UNESCO Convention 2001 is an issue that must be read in the light of the customary rules of international law and the principles under UNCLOS 1982 regarding the immunity of States vessel or property.<sup>107</sup> In both situations, the special status of warship and State vessels caused some hesitation among States to adopt the final text of the 2001 UNESCO Convention. The United States in particular, though claiming to be in full support of the final text of Article 13 of the Convention, was particularly concerned about the application of Articles 7 and 10 on warships. The primary concern was and still on the treatment of sunken warship located in the territorial waters of a coastal state.<sup>108</sup> The generally accepted view is that these vessels retain immunity indefinitely unless expressly

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<sup>107</sup> Art. 2(8) of the 2001 UNESCO Convention provides that 'Consistent with State practice and international law, including the United Nations Convention on the Law of the Sea, nothing in this Convention shall be interpreted as modifying the rules of international law and State practice pertaining to sovereign immunities, nor any State's rights with respect to its State vessels and aircraft'.

<sup>108</sup> Art. 7(3) of the 2001 Convention provides that '...in the exercise of their sovereignty and in recognition of general practice among States, States Parties, with a view to cooperating on the best methods of protecting State vessels and aircraft, *should inform* the flag State Party to this Convention and, if applicable, other States with a verifiable link...'

abandoned,<sup>109</sup> but the precise scope of the definition of 'state vessel' is unclear. Many of the historic sunken wrecks in the Southeast Asian waters including those of the Dutch, Portuguese and Chinese origin might easily be considered state vessels.

Customary rule of international law generally supports the contention that State vessels are immune from the jurisdiction of the coastal State. This is the juridical basis for the exception found under article 13 of the 2001 UNESCO Convention, regardless that the definition of underwater cultural heritage under the Convention actually covers all types of wrecks including sunken warships and State vessels. However, due to the peculiar nature and the sensitivity of information that might be gathered from these State vessels and warships, the negotiating parties of the Convention felt that distinct treatment of the subject was necessary, thus reaffirming the concept of 'sovereign immunity'. The relevant provision reads:

Warships and other government ships or military aircraft with sovereign immunity, operated for non-commercial purposes, undertaking their normal mode of operations, and not engaged in activities directed at underwater cultural heritage, shall not be obliged to report discoveries of underwater cultural heritage under Articles 9, 10, 11 and 12 of this Convention. However States Parties shall ensure, by the adoption of appropriate measures not impairing the operations or operational capabilities of their warships or other government ships or military aircraft with sovereign immunity operated for non-commercial purposes, that they comply, as far as is reasonable and practicable, with Articles 9, 10, 11 and 12 of the Convention<sup>110</sup>

The enunciation of this principle of State Immunity as applied in UNCLOS 1982 is laid out in Article 236 as follows:

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<sup>109</sup> See; Dromgoole and Gaskell, and the court pronouncement in *Simon v Taylor*, below, chapter 5.

<sup>110</sup> Art. 13 of the 2001 UNESCO Convention.

The provisions of this Convention regarding the protection and preservation of the marine environment do not apply to warship, naval auxiliary, other vessels or aircraft owned or operated by a State and used, for the time being only on government non-commercial service. However, each State shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities of such vessels or aircraft owned or operated by it, that such vessel or aircraft act in a manner consistent, so far as is reasonable and practicable, with this Convention.

Clearly the reappearance of the principle of State Immunity over warship in the UNESCO Convention 2001 is a reaffirmation of that principle as enshrined in UNCLOS 1982. One will find further reinforcement of this principle under the UN Convention on Jurisdictional Immunity of States and Their Property adopted by the UN General Assembly in 2004.<sup>111</sup> For all its practical purposes, the application of this principle on state immunity under the UNESCO Convention 2001 is intended to give added cover to military operations, otherwise, imposition of the duty to report discovery on the part of those who operated the State vessels or warships 'might reveal details of the operation which the State concerned would prefer to keep.'<sup>112</sup> The question is, does a warship enjoy a continued immunity even when it is sunken? Article 29 of UNCLOS 1982 defines warships as:

a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed force discipline.

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<sup>111</sup> This Convention is not yet in force. The text of the Convention is available at: [http://untreaty.un.org/ilc/texts/instruments/english/conventions/4\\_1\\_2004.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf). Article 3 of the Convention provides that 'A State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention.'

<sup>112</sup> O'Keefe, *Shipwrecked Heritage*, p. 101.

Note from the above UNCLOS definition of warship, the vessel concerned must be 'under command of an officer' and 'manned by a crew under regular armed force discipline'. Literally speaking, and arguably, it would appear that a sunken warship has ceased to be a warship since it is no longer 'under command of an officer' and no longer 'manned by a crew under regular armed force discipline', thus rendering it questionable whether this sunken warship would still retain the status of State Immunity.<sup>113</sup> However, just because a sunken warship is not an active warship any longer, it does not follow that there is an abandonment of interest or ownership by the State concerned.

In addition, 'State vessels' as defined by the UNESCO Convention 2001 goes beyond the 'warship' category, which is only one kind of state vessels. The Convention defines 'State vessels and aircraft' as 'warships, and other vessels or aircraft that were owned or operated by a State and used, at the time of sinking, only for government non-commercial purposes, that are identified as such and that meet the definition of underwater cultural heritage'.<sup>114</sup> Determining the nature of its use is 'a question of fact to be ascertained from all the circumstances of a particular situation'.<sup>115</sup> In deciding

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<sup>113</sup> A. Strati, *The Protection of the Underwater Cultural Heritage: An Emerging Objective of the Contemporary Law of the Sea*, 1995, p. 221.

<sup>114</sup> Article 1(8) of the UNESCO Convention 2001. 'Non-commercial purposes' type of state vessels also appears in art. 31 and 32 of UNCLOS 1982. Art. 16 of the 2004 UN Convention on the Jurisdictional Immunity of States and Their Property provides that '(1) unless otherwise agreed between the States concerned, a State which owns or operates a ship cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to the operation of that ship if, at the time the cause of action arose, the ship was used for other than government non-commercial purposes. (2) Paragraph 1 does not apply to warships, or naval auxiliaries, nor does it apply to other vessels owned or operated by a State and used, for the timebeing, only on government non-commercial service.'

<sup>115</sup> P., O. Keefe, *supra* note 14, 46. The author used *La Juliana*, a merchant ship 'pressed into service by Phillip II of Spain for the Spanish Armada' as an example to illustrate the difficulty in determining that question of fact, whether it was operated as 'state vessel' and whether it was operated for "non-commercial purpose". See also; Fletcher-Tomenius, P. & Williams, M. 'The Protection of Wrecks Act 1973: a breach of human rights?' (1998) 13 *IJMCL* 623, 626.

whether a vessel is a State vessel or otherwise, it is material to consider 'the time of the sinking', 'its geographical position' as well as 'the [applicable] laws of the time'.<sup>116</sup>

Warships and state vessels are to be treated differently from other vessels because of the 'sovereign immunity' claim that States usually attach to them, and the international law position in this respect is quite well established. Thus, 'warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State'.<sup>117</sup> Likewise, 'ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State'.<sup>118</sup> The current position is that sunken state vessels located beyond the 24 nautical miles from baseline shall be subject to control by the flag state and not the coastal state. In so far as access to underwater cultural heritage involving State vessels is concerned, the recently initiated legal battle between Spain and Odyssey Marine Exploration Inc. over alleged unauthorised recovery of Spanish treasures off Gibraltar will probably soon shed further light on this point.<sup>119</sup>

The principle of state immunity is also widely applied and has been embodied into other international agreements; namely the 1920 Brussels Convention for the Unification of Certain Rules with Respect to Assistance and Salvage at Sea and the 1989 London Salvage Convention. The latter convention provides that although it 'shall not apply to warships or other non-commercial vessels owned or operated by a state and entitled, at the time of salvage operations, to sovereign immunity under general principles of international law',<sup>120</sup> States are nevertheless empowered to decide

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<sup>116</sup> O'Keefe, above, pp. 46-47.

<sup>117</sup> Art 95.

<sup>118</sup> Art 96.

<sup>119</sup> Associated Press (AP) News, 5 June 2007.

<sup>120</sup> Art 5 of London Salvage Convention 1989.

otherwise. It is also understandable that governments have the need to protect their own interests and sensitive information that floundered with the ship.<sup>121</sup> Although this may seem to be the established norm, in practice, it has been ignored. In 1968, the United States Navy had an opportunity to seize a sunken Russian submarine which was lost together with 'torpedoes, nuclear missiles, codes and code machines, communications gear and perhaps other equipment of intense interest to the American military and intelligence services'.<sup>122</sup> It was reported that the US government salvaged the submarine with the obvious intention of evaluating its Russian technology. The US government did not report the discovery to the government of Russia.<sup>123</sup>

## 2.4 The Control Mechanism

The imposition of various duties to report, notify, and consult all relevant parties over the discovery of underwater cultural heritage in the exclusive economic zones, continental shelf as well as the 'Area', are essentially a means of control for the prevention of the wrongful dispersal and movement of underwater cultural heritage contrary to the object of the Convention. The nature of these duties has been explained above. This section focuses on the legal provisions regulating the movement of the underwater cultural heritage, whether in view of preserving the heritage in situ or in controlling its movement during excavation and in the period thereafter.

### 2.4.1 Control of Movement of Historical and Archaeological Artefacts

It must be recalled that any enforcement measures in the ocean must be carried out with due regard to States' sovereign rights, as well as coastal and flag state jurisdiction. As seen through the 1982 UNCLOS and the 2001 UNESCO Convention, the further a

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<sup>121</sup> Nicholson Sean R., 'Mutiny as to the Bounty: International law's Failing Preservation Efforts Regarding Shipwrecks and Their Artefacts Located in International Waters', 66 *UMKC L R* (1997) 135 – 167; Michael J. Kelly, 'Conflicting Trends in the Flourishing International Trade of Art and Antiquities: Restitutio in Integrum and Possessio Animo Ferundi/Lucrandi', 14 *DICK J INT'L L* (1995) 31, 45.

<sup>122</sup> Ibid (Referring to: *Military Audit Project v. Casey*, 656 F.2d 724, 728 (D.C. Cir. 1981)).

<sup>123</sup> Ibid (Referring to: *Military Audit Project v. Casey* at page 729).



particular zone from coastal state baseline, the lesser the enforcement powers of the coastal state. Within the coastal State jurisdiction, the most effective way to control activities relating to the underwater cultural heritage would be ocean policing by coastal authority. However, in the vast area of the zones beyond territorial seas, not only is coastal state jurisdiction severely limited by article 149 and 303, but enforcement is further constrained by the lack of capacity of the coastal state to do so, especially those of the developing economies such as Malaysia. Coastal state jurisdiction is thus only effective where physical control is possible. This is by far, the most important limitation that one must consider when appraising the control mechanism afforded under 1982 UNCLOS, the 2001 UNESCO Convention, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property,<sup>124</sup> and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects.

The 2001 UNESCO Convention strengthens the already established framework described above through the implementation of the measures enumerated under articles 6, 14, 15, 17 and 18. The underwater cultural heritage assumes all problems relating to the protection of movable cultural property including those relating to the illicit movement of cultural property once it has been removed from its site. Control mechanisms introduced in the UNESCO Convention 2001 are preventive in nature and complementary to those control mechanism introduced under the 1970 UNESCO Convention. Under the 1970 UNESCO Convention States parties are under obligation to implement the following measures in the event that cultural heritage has already been illegally recovered and exported to another State Party:<sup>125</sup>

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<sup>124</sup> Hereinafter the UNESCO Convention 1970.

<sup>125</sup> Art. 7 of the UNESCO Convention 1970.



- (a) To take the necessary measures, consistent with national legislation, to prevent museums and similar institutions within their territories from acquiring cultural property originating in another State Party which has been illegally exported after entry into force of this Convention, in the States concerned. Whenever possible, to inform a State of origin Party to this Convention of an offer of such cultural property illegally removed from that State after the entry into force of this Convention in both States;
- (b) (i) to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appertaining to the inventory of that institution;
- (ii) at the request of the State Party of origin, to take appropriate steps to recover and return any such cultural property imported after the entry into force of this Convention in both States concerned, provided, however, that the requesting State shall pay just compensation to an innocent purchaser or to a person who has valid title to that property. Requests for recovery and return shall be made through diplomatic offices. The requesting Party shall furnish, at its expense, the documentation and other evidence necessary to establish its claim for recovery and return. The Parties shall impose no customs duties or other charges upon cultural property returned pursuant to this Article. All expenses incident to the return and delivery of the cultural property shall be borne by the requesting Party.

In addition, States Parties are already under obligation to the following:

- (a) To prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property;
- (b) To ensure that their competent services co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner;
- (c) To admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners ;

(d) To recognize the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable which should therefore ipso facto not be exported, and to facilitate recovery of such property by the State concerned in cases where it has been exported.

First, 'States Parties shall take measures to prohibit the use of their territory, including their maritime ports, as well as artificial islands, installations and structures under their exclusive jurisdiction or control, in support of any activity directed at underwater cultural heritage which is not in conformity with [the] Convention'.<sup>126</sup> This prohibition is arguably the most significant mechanism in ensuring that the offenders will not to evade the law. Without this provision, the Convention is probably almost useless. Take the hypothetical situation of illegal treasure hunting which took place in the Exclusive Economic Zone of Indonesia involving, say, the discovery of the *Flor de La Mar*, which would be of interest to the governments of Malaysia, Indonesia and Portugal. Assuming that these countries are parties to the UNESCO Convention, the Convention will fail to impose constraints on activities which violate the rules of the Convention if Singapore is not a party to the Convention too, since nothing will stop the treasure hunters from using any Singapore port as a safe haven for 'refuelling, obtaining stores'<sup>127</sup> as well as an exit point for the movement of the recovered underwater cultural heritage to other destinations.<sup>128</sup> Regarding the latter, such measures are strengthened by imposing on States an obligation 'take measures to prevent the entry into their territory, the dealing in, or the possession of, underwater cultural heritage illicitly exported and / or recovered, where recovery was contrary to [the] Convention'.<sup>129</sup>

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<sup>126</sup> Article 15 of the 2001 UNESCO Convention.

<sup>127</sup> Derived from a hypothetical situation explained in a commentary note to the ILA draft. *Flor de La Mar* is yet to be found until today. The vessel which sank somewhere in Indonesian waters containing cargoes of the riches of Malacca Kingdom treasures robbed by the Portuguese from the Sultan's palace after attacking it.

<sup>128</sup> In fact, Singapore and Thailand have often been cited as the most popular exit points for the movement of cultural property in the Southeast Asian region.

<sup>129</sup> Article 14 of the 2001 UNESCO Convention.

The obligation specified in article 15 of the UNESCO Convention above is not a novelty in the development of port state jurisdiction. Such a right has already been embodied under article 25(2) of UNCLOS 1982 which provides that 'in the case of ships proceeding to internal waters or call at a port facility outside internal waters, the coastal state also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject' and in preventing pollution from ships, such a right appears again whereby 'States which establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports or internal waters or for a call at their off-shore terminals' are asked to give due publicity to such requirements.<sup>130</sup> In the Straddling Stock Agreement 1995 this right to deny entry into ports is further affirmed.<sup>131</sup> The ICJ in the *Nicaragua* recognised that such a right is a 'basic legal concept of state sovereignty in customary international law' and it is by virtue of its sovereignty that States 'may regulate access to its ports'.<sup>132</sup>

#### 2.4.2 Measures in relation to looted underwater cultural heritage

In the instance where the underwater cultural heritage has been looted or otherwise 'recovered in a manner not in conformity with [the] Convention', it is the responsibility of the States concerned 'to take measures providing for the seizure of underwater cultural heritage in its territory'.<sup>133</sup> Seizure should be followed by the necessary steps required 'to record, protect' and to 'take all reasonable measures to stabilise underwater

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<sup>130</sup> Art. 211(3) of UNCLOS 1982.

<sup>131</sup> Art. 23(4) of the *Straddling Fish Stocks Agreement* 1995.

<sup>132</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), ICJ Reports (1986) p. 14, para 212. For further academic discussion on 'port jurisdiction', see: V. Lowe, 'The Right of Entry into Maritime Ports in International Law', *San Diego L. Rev.* 14 (1977), 597, G.C. Kasoulides, *Port State Control Jurisdiction: Evolution of the Port State Regime*, 1993, and L. de La Fayette, 'Access to Ports in International Law', *International Journal of Marine and Coastal Law* 11 (1999) p. 1.

<sup>133</sup> Art. 18(1).

cultural heritage seized' under the Convention.<sup>134</sup> The same as the duty on the part of the coastal state concerned to report and notify the Director-General<sup>135</sup> of discovery of underwater cultural heritage in the exclusive economic zone, the continental shelf and the Area, a coastal State also has the duty to notify the Director-General as well as 'any other State with a verifiable link, especially a cultural, historical or archaeological link, to the underwater cultural heritage concerned of any seizure of underwater cultural heritage that it has made under [the] Convention'.<sup>136</sup> In the commentary to the initial ILA Draft, one hypothetical situation was given as follows:

Suppose that European excavators of material excavated off the Malaysian coast proceed directly from the Far East to the Netherlands and suppose that the Netherlands is not a party to the Convention. There the material is sold by auction. One of the purchasers is French and brings his ceramics home. Under the Convention, if France was a Party, it would have an obligation to seize the ceramics. This obligation exists whatever the number of intervening transactions in an object.<sup>137</sup>

Allowing seizure by any State is probably the strength of article 18 as one must consider two differing situations where seizure would be needed; in a country where the illegal recovery took place or in a country where the object was brought into.<sup>138</sup> In 1984, the Singaporean authority returned many artefacts illegally recovered off the coast of Johore from the wreck of the *Risdam* at the request for assistance by the government of Malaysia,<sup>139</sup> while in the neighbouring Indonesia, in the *Tek Sing* incident, the Australian government seized artefacts at the request of the Indonesian

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<sup>134</sup> Art. 18(2), *Ibid.*

<sup>135</sup> The Director General of UNESCO.

<sup>136</sup> Art. 18(3) of the UNESCO Convention.

<sup>137</sup> Report of the Cultural Heritage Law Committee in Crawford, J. & Williams, M., (eds.) *International Law Association: report of the 66<sup>th</sup> Conference, 1994*, p. 432. See also O'Keefe, *Commentary*, p. 116.

<sup>138</sup> The wording of art. 18(1) of the 2001 Convention would also cover these two situations.

<sup>139</sup> Believed to be a vessel of Dutch origin, the *Vereenigde Oostindische Compagnie* (VOC). See; Adi Haji Taha, 'Masalah dan Persoalan Semasa Mengenai Arkeologi Maritim di Semenanjung Malaysia', p.137-138, in *Jawatankuasa Penerbitan Jabatan Sejarah Universiti Malaya, Kapal dan Harta Karam*, 1986.

government. These incidences reflect the strength of seizure as an effective measure of control. However, swift communication and smooth cooperation between States is necessary for the implementation of such measure. In addition, any artefacts which have been looted have most probably been subject to much risk of damage especially so when in situ preservation of the heritage would have been the better option. In this context, the best course of action to be undertaken by the State which seized the artefacts to ensure that any course of action including the disposal of the heritage takes 'into account the need for conservation and research... reassembly of a dispersed collection... public access, exhibition and education; and the interest of any State with a verifiable link, especially a cultural, historical or archaeological link, in respect of the underwater cultural heritage concerned.'<sup>140</sup>

### **2.4.3 The Role of Bilateral or Multilateral Cooperation**

Two or more States may be interested in a particular discovery of underwater cultural heritage. Legal mechanisms offered under article 14, 15 and 18, discussed above, will be more effective through the cooperation of States, particularly, one which is established through a legally binding agreement. The 2001 UNESCO Convention encourages the 'States Parties to enter into bilateral, regional or other multilateral agreements or develop existing agreements, for the preservation of underwater cultural heritage'.<sup>141</sup> It would seem that States parties to such an agreement hold the decision to invite other states with 'verifiable link' to the underwater cultural heritage concerned to join in the bilateral or multilateral cooperation.<sup>142</sup> Special agreements between States arising from their obligation under the 2001 UNESCO Convention, should not derogate from the general principles underlying the Convention. States are called upon to 'adopt rules and regulations which would ensure better protection of underwater cultural heritage

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<sup>140</sup> Art. 18(4).

<sup>141</sup> Art. 6 (1).

<sup>142</sup> Art. 6(2).

than those adopted in this Convention.’<sup>143</sup> In this sense, it is submitted that, the Annex Rules of the Convention must be set as the benchmark – the absolute minimum standard to be applied to underwater cultural heritage protection, otherwise, the 2001 UNESCO Convention will be reduced in value and some of its objectives might come to naught. However, in view of ensuring the validity of other international agreements, which have taken place notwithstanding the 2001 UNESCO Convention, the latter shall not be read to ‘alter the rights and obligations of States Parties regarding the protection of sunken vessels, arising from other bilateral, regional or other multilateral agreements concluded before its adopted, and, in particular, those that are in conformity with the purpose of this Convention.’<sup>144</sup>

A multilateral agreement such as the 2001 UNESCO Convention is a global attempt in developing legal regime to protect underwater cultural heritage. However, a special agreement between certain countries on the other hand, has the advantage of offering a more practical way to protect the underwater cultural heritage. The discovery of a particular historic wreck usually attracts the interest of certain States with verifiable link only and not the whole world. Specific agreements between States can particularly be useful and more practical when the States attempt to carry out their responsibility. Article 19 specifies that ‘States Parties shall cooperate and assist each other in the protection and management of underwater cultural heritage under [the] Convention, including, where practicable, collaborating in the investigation, excavation, documentation, conservation, study and presentation of such heritage’.<sup>145</sup> In addition, States must cooperate with one another;

to the extent compatible with the purposes of the Convention... to share information with other States parties concerning the underwater cultural

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<sup>143</sup> Ibid.

<sup>144</sup> Art. 6(3).

<sup>145</sup> Art. 19(1).

heritage, including the discovery of the heritage, location of heritage, heritage excavated or recovered contrary to this Convention or otherwise in violation with international law, pertinent scientific methodology and technology and legal developments relating to such heritage.<sup>146</sup>

In connection with the issue of information sharing, it may involve the dissemination of certain highly classified information, therefore, for security reasons, and in order to prevent disclosure of the location of such wrecks to treasure hunters, the 2001 Convention provides that such information, which is 'shared between States parties or between UNESCO and States Parties... shall, to the extent compatible with their national legislation, be kept confidential and reserved to competent authorities of States Parties as long as the disclosure of such information might endanger or otherwise put at risk the preservation of such underwater cultural heritage.'<sup>147</sup>

Another advantage stemming from States' cooperation through a special agreement is the opportunity for States for 'training in underwater archaeology, in techniques for the conservation of underwater cultural heritage and, on agreed terms, in the transfer of technology relating to the underwater cultural heritage'.<sup>148</sup> In addition, rule 8 of the 2001 UNESCO Convention provides that 'international cooperation in the conduct of activities directed at underwater cultural heritage shall be encouraged in order to further the effective exchange or use of archaeologists and other relevant professionals.' Although the Convention requires global funding for underwater archaeology training, it is also possible to conduct training activities through bilateral or specific arrangement amongst certain States or institutions. Recent examples of such training cooperation include the conservation training for the recovery of the wreck *Swift* in Argentina in

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<sup>146</sup> Art. 19(2).

<sup>147</sup> Art. 19(3).

<sup>148</sup> Art. 21.



2001<sup>149</sup> and the regional training programme of the World Heritage city of Galle in Sri Lanka.<sup>150</sup>

The implementation of States' duty to cooperate with one another no doubt requires some highly technical measures, which are probably best served through specific agreements. Such multilateral and bilateral cooperation have already taken place amongst certain States even before the adoption of the 2001 UNESCO Convention. Considering that it will still be quite some time before the 2001 UNESCO Convention would come into force, it is useful to note how States conduct themselves in matters involving activities directly or indirectly affecting underwater cultural heritage. Some of the examples of inter-state or regional agreement that have already taken place regarding the recovery and protection of underwater cultural heritage are the Agreement between Australia and The Netherlands Concerning Old Dutch Shipwrecks 1972,<sup>151</sup> the Agreement between the Republic of Estonia, the Republic of Finland, and the Kingdom of Sweden Regarding MS/Estonia 1995,<sup>152</sup> the Understanding between the United Kingdom and South Africa concerning the Birkenhead 1990,<sup>153</sup> the Agreement between France and the United States on the CSS Alabama 1989,<sup>154</sup> the La Belle Agreement, as well as the recent Agreement between USA, Canada, France and UK on the RMS Titanic. The Council of European Draft Convention on the Protection of the Underwater Cultural Heritage 1985 is an example of regional agreement on the subject

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<sup>149</sup> See; Dellino, V. & Luz Endere, M. 'The HMS Swift Shipwreck: The Development of Underwater Heritage Protection in Argentina' (2001) 4 *Conservation and Management of Archaeological Sites* 219, 224. The case was also illustrated in O'Keefe, p. 129.

<sup>150</sup> Action Plan No. 7, the UNESCO Asia-Pacific regional Workshop on the 2001 Convention on the Protection of the Underwater Cultural Heritage in Hong Kong, 20 November 2003.

<sup>151</sup> 1972 Australian Treaty Series No. 18. See; O'Keefe, P., International Waters, in Dromgoole, S. (editor), *Protection of Underwater Cultural Heritage: International and National Perspectives*, 1999, pp. 225.

<sup>152</sup> Roach, J.A., 'Sunken warships and military aircraft; and the Agreement regarding MS/Estonia', 20 *MARINE POLICY* (1996). The agreement is also reproduced in *Marine Policy* (1996) p. 355.

<sup>153</sup> 'Exchange of Notes' between the two Governments.

<sup>154</sup> *Arrangement entre le Gouvernement de la Republique francaise et le Gouvernement des Etats-Unis d'Amerique au sujet de l'epave du CSS Alabama* 1995.



although unfortunately it was never adopted by the States concerned. The Protocol concerning Specially Protected Areas and Biological Diversity in the Mediterranean 1995, although not an agreement pertaining to any specific historic wreck, is an example of regional agreement which affects the protection of the underwater cultural heritage, notably, for its recognition over 'sites of particular importance because of their scientific, aesthetic, cultural and educational interest'.<sup>155</sup>

#### 2.4.4 Sanctions

Sanctions, obviously, play an important role in providing effective implementation of the 2001 UNESCO Convention. States have the duty under the Convention 'to impose sanctions for violations of measures it has taken to implement the Convention'.<sup>156</sup> The rationale for such imposition is twofold; to deter violations and to 'deprive the offenders of the benefit from their illegal activities'.<sup>157</sup> As such, sanctions must also be 'adequate in severity to be effective in securing compliance with [the] Convention'.<sup>158</sup> Sanctions can be 'of a penal nature' such as 'fines or imprisonment' or in the case where artefacts have been removed from their sites, the 'seizure' of such artefacts from the possession of the offender.<sup>159</sup> However, these are essentially a form of measure against individuals and corporations. A more appropriate and effective sanction against a State which violated its obligation to protect underwater cultural heritage needs further scrutiny. According to the UNESCO official in Malaysia, in the case of world heritage site, proper sanction would be in the form of de-listing from world heritage list,<sup>160</sup> an embarrassing

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<sup>155</sup> Art. 4(d) of the Protocol. The Protocol available at:  
[http://195.97.36.231/dbases/webdocs/BCP/ProtocolSPA9596\\_eng\\_p.pdf](http://195.97.36.231/dbases/webdocs/BCP/ProtocolSPA9596_eng_p.pdf).

<sup>156</sup> Art. 17(1) of the 2001 UNESCO Convention

<sup>157</sup> Art. 17(2), *Ibid*.

<sup>158</sup> *Ibid*.

<sup>159</sup> Art. 18. Also considered under para. 4.2 above.

<sup>160</sup> Information by Mr. Mohanan Nair, Malaysia National Commission for UNESCO, 5<sup>th</sup> Floor, Block F, Pusat Bandar Damansara, 50604, Kuala Lumpur.

punishment that could deter States from violating its obligations under the relevant treaties.

## **2.5 Balancing Competing Interests**

The 2001 UNESCO Convention recognises the competing interests surrounding underwater cultural heritage. Any laws protecting this special heritage must give due consideration for these competing interests. Commercial interests such as that of commercial salvage industry or smaller scale recreational tourism sector such as those offering scuba and wreck diving activities must be given proper consideration while at the same time and adhering to the accepted archaeological principles provided under the 2001 UNESCO Convention. The principles enunciated under article 2, which is at the heart of the Convention, must be read together as a package. A summary of these principles and the competing interests surrounding underwater cultural heritage is found in the preamble to the Convention, which reads:

The importance of the underwater cultural heritage, the responsibility of all States in its protection, the public interest in it, the need for non-intrusive access to it, the need to prevent activities directly or incidentally affecting it, the concern for commercialization, the need for cooperation between different subjects to protect it, the will to codify and progressively develop international law in this field, the priority of in situ conservation of the underwater heritage.

Some of the general principles enshrined in Article 2 of the UNESCO Convention (also found in the Annex Rule of the Convention), are more easily accepted than the others, while some are more controversial than the rest, resulting in abstentions as well as objections by certain States from voting in favour of the adoption of the Convention in Paris in 2001. The following sections will discuss some of the issues mentioned in the above preamble.

### 2.5.1 The Public's Right to Enjoy Underwater Cultural Heritage

The 2001 UNESCO Convention acknowledges that the public have the right of enjoyment of the heritage.<sup>161</sup> After all, a lay person might ask, how can a cultural property be of any use to anyone, if it is sunk, at the bottom of the ocean, and inaccessible to anyone but a select few of underwater archaeologists? The role of the government in this respect is to educate the public on the significance of cultural heritage<sup>162</sup> and to give proper consideration for in situ access, as a form educational enjoyment of the heritage.<sup>163</sup> However, the public's right of access to underwater cultural heritage is not without qualification. Access is only permissible when it is non-intrusive and does not adversely affect such heritage. Article 2(10) of the Convention in particular provides that 'responsible non-intrusive access to observe or document in situ underwater cultural heritage shall be encouraged to create public awareness, appreciation, and protection of the heritage except where such access is incompatible with its protection and management'.<sup>164</sup> Since the 2001 UNESCO Convention abhors commercialisation of the underwater cultural heritage, the Government needs to carefully consider activities such as scuba wreck diving, which is an expensive hobby for most people and which is usually conducted through a commercialised and licensed activity.<sup>165</sup> Although it can be argued that some form of commercialisation may be necessary to support the tourism related business, problems might arise in terms of supervision and enforcement in these areas.

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<sup>161</sup> Art. 2(10) of the 2001 Convention and Rule No. 7 of the Annex Rule.

<sup>162</sup> Art. 20 of the 2001 Convention.

<sup>163</sup> Rule No. 7 of the Annex Rules of the Convention.

<sup>164</sup> This rule is reiterated in rule no. 7 of the Annex Rule, which provides that, 'that 'public access to in situ underwater cultural heritage shall be promoted, except where such access is incompatible with protection and management'.

<sup>165</sup> A wreck diver needs to hold a valid diving license PADI before they can commit themselves to such activities, otherwise committing an offence and any Scuba operator which does not comply with license requirements will face repercussion under relevant laws and wreck diving is even a more specialised activity in Malaysia.

### 2.5.2 In situ preservation

Managing underwater cultural heritage covers many aspects of 'protection' ranging from 'in situ preservation' to its protection 'after its recovery from its underwater environment'.<sup>166</sup> Underwater cultural heritage is, like any other archaeological heritage, a 'non-renewable stock' of archaeological and cultural resources.<sup>167</sup> Compared to ocean's natural resources of flora and fauna, archaeological heritage 'cannot reproduce itself, recolonise decimated areas, or be transplanted'.<sup>168</sup> Therefore, as a non-renewable resource, it has to be guarded jealously against irreparable loss and destruction. Here, the survival of this type of resource is, to a certain extent, dependent upon its 'close interaction with the realm of law'.<sup>169</sup> Under the 2001 Convention, this principle is elaborated in the following term:

The protection of underwater cultural heritage through in situ preservation shall be considered as the first option. Accordingly, activities directed at underwater cultural heritage shall be authorised in a manner consistent with the protection of that heritage, and subject to that requirement may be authorised for the purpose of making a significant contribution to the protection or knowledge or enhancement of underwater cultural heritage.<sup>170</sup>

Scientific studies targeting at underwater heritage should be allowed only if researchers can demonstrate that such activities have valid benefits to science and are in full compliance with the principles of the 2001 Convention. Furthermore, in principle, in

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<sup>166</sup> Guido Carducci, 'New Developments in the Law of the Sea: The UNESCO Convention on the Protection of the Underwater Cultural Heritage.', 96(Vol.2) *AJIL* (2002) 426.

<sup>167</sup> Cleere, H. F., 'Approaches to the Archaeological Heritage', in Cleere, H. F., *New Directions in Archaeology*, Cambridge University Press, p. 127. See also: Darvill, T., *Ancient Monuments in the Countryside: An Archaeological Management Review*, English Heritage Archaeological Report No. 5, 1987, English Heritage, London.

<sup>168</sup> Darvill, T., above, note 167, p. 4.

<sup>169</sup> McGimsey, C.R. and Davis, H. A. (eds.), *The Management of Archaeological Resources: The Arlie House Report*, Society for American Archaeology, 1977, p. 9. See also; Cleere, H. F., 'Great Britain' in Cleere, H. F.(ed) above, p. 10.

<sup>170</sup> Rule 1 of the Annex Rules.

situ preservation of underwater cultural heritage remains the preferred method of preservation.<sup>171</sup> It is important that the application of in situ preservation should not be in conflict with the public's right to enjoy the educational and recreational benefits of responsible and non-intrusive access to in situ underwater cultural heritage'.<sup>172</sup>

It is vital that 'in situ preservation' is not interpreted as a kind of absolute prohibition of any form of interference to the heritage and the site they are located on. Although the rule is regarded as a 'general principle' under the Convention, it also works as a 'first option' rule. There will be instances where in situ preservation actually work against the objective of the Convention to protect and to preserve the heritage against further damage, thus justifying interference which are in conformity with the 2001 Convention. O'Keefe explained that such an interference is permissible provided that it is conducted on the basis of and for 'scientific investigation' and is conducted in order to safeguard 'material from a site threatened by development, natural deterioration etc.'<sup>173</sup> Not surprisingly, the requirement for 'in-situ preservation' has caused much disagreement from the commercial salvage community and from those who advocated for a much more flexible approach for the preservation of underwater cultural heritage. Such discontent has resulted from the understanding that certain historic wrecks would, unless recovered and brought to the surface, only deteriorate further. In this sense, in situ preservation is not the preferred method of preserving the heritage. The Titanic Guidelines, although it was not formulated under the purview of the UNESCO Convention 2001, offers an elaborate guide into the application of the precautionary principle in preserving underwater cultural heritage. The Guidelines provides that 'in

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<sup>171</sup> A principle which made an earlier appearance in art. 1 of the 1996 ICOMOS Charter on the Protection and Management of the Underwater Cultural Heritage.

<sup>172</sup> Reiterated in Rule 7 of the UNESCO Convention 2001 that 'public access to in situ underwater cultural heritage shall be promoted, except where such access is incompatible with protection and management'.

<sup>173</sup> O'Keefe, *Shipwrecked Heritage: A Commentary on the UNESCO Convention 2001*, p. 155.

situ preservation' emulates a 'precautionary approach' and it is 'not intended as a legal presumption against the recovery or salvage of artefacts conducted in a manner consistent with these guidelines' and therefore the 'recovery or salvage of the artefacts may be justified by educational, scientific or cultural interest.'<sup>174</sup> Explanatory note to the Titanic Guidelines, reproduced below, also purports to erase misunderstanding of the full impact of the notion in situ preservation:

While the concept of in situ preservation promotes and encourages maintaining the wreckage as it currently exists, it will not prevent recovery or salvage that is determined to be in public interest. Nor does this approach detract from the educational value of the ship or inhibit the public access to the wreck site or to any recovered or salvaged artefacts by the general public.<sup>175</sup>

Thus, those who are against the in situ preservation of the Titanic argued that 'in situ preservation is simply a precautionary management approach and is not intended to create any legal presumption to preclude recovery or salvage' of the wreck.<sup>176</sup> Instead, great effort must be made for the careful planning and execution of the recovery activity relating to the heritage so that artefacts recovered could be properly preserved, documented and displayed for the benefit of the public.<sup>177</sup>

### 2.5.3 Prohibition of Commercial Exploitation

The 2001 UNESCO Convention prohibits commercial exploitation of underwater cultural heritage,<sup>178</sup> in the form of 'trade or speculation or its irretrievable dispersal...

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<sup>174</sup> Titanic Guidelines, Definition, para(d).

<sup>175</sup> *The Titanic Guidelines*, Federal Register Vol. 66 No. 71 / Thursday, April 12, 2001 / Notices, p. 18908.

<sup>176</sup> Ibid. See also; para (d) under 'Scope and Definitions' of the 'Guidelines for Research, Recovery and Salvage of RMS Titanic', Federal Register / Vol. 66, above, note 174, p. 18912.

<sup>177</sup> The Guidelines contain extensive rules relating to project design, project timetable, objectives, methodology and techniques, preliminary work assessment, documentation standards, artefacts conservation plan and many other rules relating to the preservation of underwater cultural heritage.

<sup>178</sup> Art 2(7) of UNESCO Convention 2001.

fundamentally incompatible with the protection and proper management of underwater cultural heritage...[and] shall not be traded, sold, bought or bartered as commercial goods.’<sup>179</sup> The final text of this rule as was the result of a certain compromise. Thus, ‘commercial exploitation’ does not prevent:

- a) the provision of professional archaeological services or necessary services incidental thereto whose nature and purpose are in full conformity with this Convention and are subject to the authorisation of the competent authorities;
- b) the deposition of underwater cultural heritage, recovered in the course of a research project in conformity with this Convention, provided such deposition does not prejudice the scientific or cultural interest or integrity of the recovered material or result in its irretrievable dispersal; is in accordance with the provisions of Rules 33 and 34,<sup>180</sup> and is subject to the authorisation of the competent authorities.

If the rule of prohibition of commercial exploitation is interpreted very strictly without considering the qualifications made in the above mentioned sub-sections, virtually all transactions relating to the underwater cultural heritage including the sale and purchase of museum ticket could be regarded as not in conformity with the objective of the Convention. Equating commercialisation with ‘money making’ understood from the words ‘traded, sold, bought or bartered as commercial goods’ is counter-productive. The sale of tickets to museum exhibition, for instance, which showcases underwater cultural heritage could also be interpreted as a money making activity but this is not incompatible with the spirit of the Convention. Museums fees would help

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<sup>179</sup> Rule No. 2 of the Annex Rules.

<sup>180</sup> Rules no 33 and 34 deal with the curation of project archives, which is a significant element of the objective of recovery underwater cultural heritage. The rules provide that ‘the project archives, including any underwater cultural heritage removed and a copy of all supporting documentation shall, as far as possible, be kept together and intact as a collection in a manner that is available for professional and public access...as well as for the curation of the archives. This should be done as rapidly as possible and in any case not later than ten years from the completion of the project, in so far as may be compatible with conservation of the underwater cultural heritage.’



cover the costs of running the museums. After all, one of the objectives of the Convention is to encourage and create public awareness, and appreciation of such heritage.<sup>181</sup>

Government policy allows 'commissioning' private companies in the pursuit of searching and recovering significant underwater cultural heritage in Malaysian waters.<sup>182</sup> In countries where technology and funding are both lacking, the policy formulated is often influenced by such problems. Thus, the government satisfies itself by adopting a balanced approach to the situation, maintaining that it is not 'commercialisation' of such heritage but an act of 'commissioning' that funds the recovery project. Flecker pointed out, in his comments on the trend prevalent on shipwreck excavations in Southeast Asia, that:

Governments cannot afford to excavate shipwrecks and display the recovered artefacts themselves. They generally do not have enough qualified people. A compromise is called for. Commercial companies are necessary to provide finance. Sale of some artefacts is necessary to attract that finance. It is up to the governments to formulate policy that ensures that commercial groups carry out excavation work to acceptable archaeological standards, that they disseminate their results, and that fully representative samples are kept for public display. Governments can certainly benefit financially from the sale of artefacts, but their standing and credibility would be much enhanced if such funds were channelled back into museums and training so that eventually they would be in a position to undertake maritime archaeological projects themselves, independent of commercial companies.<sup>183</sup>

Underwater search and exploration when compared to a similar project along the coastline itself is about 'twenty to fifty times' costlier.<sup>184</sup> In the pursuit for the

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<sup>181</sup> Art 2(10) of UNESCO Convention 2001.

<sup>182</sup> Dato' Adi Haji Taha, Director General of the Department of Museums, Malaysia.

<sup>183</sup> M Flecker, *The Ethics, Politics and Realities of Maritime Archaeology in Southeast Asia*, 31 *IJNA* (2002) 14-15.

<sup>184</sup> Anastasia Strati, *supra* note 16, 346.



discoveries of significant historic wrecks, the Malaysian government is aided by commercial salvors whose main interest is mainly in the profit making. This is not necessarily a bad news. A well known commercial company in Malaysia, the Nanhai Marine Archaeology Sdn Bhd., (following the completion of excavations, research, recording of all artefacts, and reports), shares the recovered artefacts with the National Museum, which maintains its share for the continued study and display of these artefacts,<sup>185</sup> while the company, on the other hand, is allowed to sell its share for the purpose of financing further work. The company claims to adopt a policy of donating 'other artefacts to relevant museums, present the findings from the excavations and research to the widest possible audience, and then to sell the remaining pieces'.<sup>186</sup>

However, it would seem that the issue of commercialisation affects not only the least developed countries but also developed countries such as the United Kingdom. The controversy over the United Kingdom's involvement in a 'commercial deal' with Odyssey Maritime Explorations; a United States based commercial company on the project for the discovery of the well known HMS Sussex which was discovered off Gibraltar, is one fine example. ICOMOS expressed grave concern over this deal days after the adoption of the 2001 UNESCO Convention (where the United Kingdom abstained from voting). It called the parties involved to treat HMS Sussex in line with 'best international practice',<sup>187</sup> alleging that the deal was contrary to the 1996 ICOMOS Charter, which provides that underwater cultural heritage should not be sold as commercial goods.

Commentary in the *Titanic Guidelines* on this issue is particularly useful and it seems to provide ideal interpretation in allowing commercial exploitation of underwater cultural

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<sup>185</sup> 'Discovering Asia's Ceramic Development' at: <http://www.maritimeasia.ws/exhib01/pages/p019.html>.

<sup>186</sup> Ibid.

<sup>187</sup> ICOMOS UK. See online source: [http://www.icomos.org/uk/news/hms\\_sussex\\_press.doc](http://www.icomos.org/uk/news/hms_sussex_press.doc).

heritage. It stated that 'basic professional archaeological standards dictate that artefacts recovered from the wreck site should not be dispersed through the sale of individual artefacts to private collectors such as through auction house sales, [instead], all artefacts from RMS Titanic should be kept together and intact as project collections.'<sup>188</sup> Commercial exploitation thus does 'not necessarily preclude the sale, transfer or trade of an entire collection to a museum or other qualified institution, provided that this commercial transaction does not result in the dispersal of the artefacts. As long as the collection is kept together, maintained for research, education, viewing and other use of public interest'.<sup>189</sup> In other words, there should be no complete ban of commercial transaction, in the furtherance of public interest.

#### **2.5.4 Application of Salvage Law**

The 2001 UNESCO Convention does not exclude the application of salvage law but the relevant texts were specifically drafted to protect underwater cultural heritage from the ruthless application of salvage law principles. In fact, the application of salvage law is not included as one of the objectives of the Convention.<sup>190</sup> However, in achieving the objectives and general principles of the Convention, the role played by salvage law becomes important. Article 4 of the UNESCO Convention 2001 reads:

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<sup>188</sup> See also Article 3 of the Titanic Agreement between UK, USA, France as well as the RMS Titanic Memorial Act 1986. In a similar vein, the Society for Historical Archaeology maintained that; 'when individual objects from a collection are scattered to vastly different owners and facilities, they lose their value as heritage and their collective ability to inform us, both professionals and the public, about our heritage. Further, dispersal of collections severely limits the ability of researchers to locate these scattered objects and travel to them to study them. Dispersal of collections to diverse facilities can also foster markedly different treatments for the objects, which could result in deterioration and ultimate loss of objects. None of these very real scenarios is consistent with preserving underwater cultural heritage for the benefit of mankind.

<sup>189</sup> *Titanic Guideline* explanatory note, para 180906 – 18907.

<sup>190</sup> Art. 2 of the Convention.

Any activity relating to underwater cultural heritage to which this convention applies shall not be subject to the law of salvage or law of finds, unless:

- (a) It is authorized by the competent authorities, and
- (b) It is in full conformity with this Convention, and
- (c) It ensures that any recovery of the underwater cultural heritage achieves its maximum protection.

In the instance where the salvage of historic wreck has been authorised by a State, it is the responsibility of that State to ensure that activities directed at underwater cultural heritage shall not adverse results more than what 'is necessary for the objectives of the project'.<sup>191</sup> In deciding what is 'necessary', one probably needs to take into account that such activities:

must use non-destructive techniques and survey methods in preference to recovery of objects. If excavation or recovery is necessary for the purpose of scientific studies or for the ultimate protection of the underwater cultural heritage, the methods and techniques used must be as non-destructive as possible and contribute to the preservation of the remain.<sup>192</sup>

The initial ILA Draft of the 2001 Convention attempted to exclude the application salvage laws<sup>193</sup> in order to disassociate protection of underwater cultural heritage from any form of commercialisation of such heritage. Although the exclusion of salvage law was later discarded during the negotiation process, another attempt was made by certain States to replace that exclusion of salvage law clause with another clause designed to exclude 'application of any internal law or regulation having the effect of providing commercial incentives for the excavation and removal of underwater cultural heritage'.<sup>194</sup> Had this attempt been successful, it would practically have had the effect as if salvage laws were totally excluded from the Convention, since, the primary object of salvage laws were obviously the commercial incentives for efforts and money spent on

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<sup>191</sup> Rule 3 of the Anne Rules to the UNESCO Convention 2001.

<sup>192</sup> Rule 4.

<sup>193</sup> Art. 4, ILA Draft.

<sup>194</sup> Art. 12(2) of the 1998 UNESCO Draft.

salvage.<sup>195</sup> Practically, it would be foolish to consider totally excluding the application of salvage laws over historic wrecks. As mentioned earlier, in Malaysia, all recovery projects involving historic wrecks have so far been undertaken with the aid of commercial salvage company, which has the technology and the expertise in deepwater recovery. Without this partnership, certain significant historic shipwrecks such as the *Diana* and a few others would remain on the ocean floor relatively unknown and unstudied. Although many of the artefacts recovered from the wreck of *Diana* wreck ended up in an auction house in Amsterdam in 1992, it also resulted in a proper documentation relating to the wreck with significant artefacts retained by the Malaysian government. The government also purchased many of these artefacts during the auction itself.<sup>196</sup> Malaysia is not alone in resorting to the expertise of private companies. Similar practice is held by the neighbouring Indonesia in the salvage of Geldermahlsen and even the far more advanced and wealthy maritime State such as the United Kingdom.<sup>197</sup>

## **2.6. Annex Rules of the 2001 UNESCO Convention**

### **2.6.1 Status of the Annex Rules**

One of the strengths of the UNESCO Convention 2001, applauded even by the maritime powers who objected or abstained from voting the adoption of the Convention, is the standard setting Annex Rules of the Convention. The Annex contains rules and principles in implementing the Convention,<sup>198</sup> including many technical issues relating

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<sup>195</sup> Dromgoole, (2003) IJMCL, p. 70.

<sup>196</sup> Information by the Department of Museum, Kuala Lumpur. Artefacts from the *Diana* wreck are displayed in maritime archaeology museum in Kuala Lumpur which was established in late 2001 as a temporary museum.

<sup>197</sup> See ; Flecker, M., above, note 181.

<sup>198</sup> Rule 1-8; (1) in situ preservation, (2) commercial exploitation, (3, 4, 5 & 6) how are activities affecting the underwater cultural heritage to be regulated, (7) public access and (8) international cooperation.

to project design,<sup>199</sup> preliminary work,<sup>200</sup> project objectives/methodology/techniques,<sup>201</sup> funding,<sup>202</sup> project duration,<sup>203</sup> competence and qualification,<sup>204</sup> conservation and site management,<sup>205</sup> documentation,<sup>206</sup> safety,<sup>207</sup> environmental policy,<sup>208</sup> report,<sup>209</sup> curation of project archives<sup>210</sup> and finally dissemination of information.<sup>211</sup> The Rules are also an integral part of the convention. Article 33 of the UNESCO Convention provides that 'the rules annexed to this Convention form an integral part of it and, unless expressly provided otherwise, a reference to this Convention includes a reference to the Rules.' At present, the Rules are more likely to be regarded as 'aspiration' as its application depends on coming into force the UNESCO Convention 2001 and a wider ratification or acceptance of the Convention. One may thus argue that the Annex Rules have a soft law character.<sup>212</sup> They were originally drafted to be able to evolve to meet the demands for and changes in the best techniques in underwater archaeology. Some of the rules also replicate certain principles and objectives enunciated in the main text of the Convention,<sup>213</sup> thus strengthening their legal significance. In addition, the language of the provision is clear in that 'the rules form an integral part of the Convention' and that

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<sup>199</sup> Rule 9-13; (9) requirement of project design, (10) content of project design, (11) conformity with project design, (12) review of project design in the event of unexpected discovery, and (13) rules relating to urgent and discovery by chance.

<sup>200</sup> Rule 14 & 15.

<sup>201</sup> Rule 16.

<sup>202</sup> Rule 17-19.

<sup>203</sup> Rule 20 & 21.

<sup>204</sup> Rule 22 & 23.

<sup>205</sup> Rule 24 & 25.

<sup>206</sup> Rule 26 & 27.

<sup>207</sup> Rule 28.

<sup>208</sup> Rule 29.

<sup>209</sup> Rule 30 & 31.

<sup>210</sup> Rule 32-34.

<sup>211</sup> Rule 35 & 36.

<sup>212</sup> For most updated discussion on the status of soft-law in the development of international law in general, see; Boyle, A., and Chinkin, C., above, pp. 211-229.

<sup>213</sup> Such as on the first option rule of in situ preservation, prohibition of commercial exploitation of the heritage and guarantee of public access to the heritage site.

they would consequently bind the States party to the Convention. Nor is amendment made easy.<sup>214</sup> The 'Rules' thus represent the current standard practice on the ethics and methods in underwater archaeology, although, by way of comparison, they are less stringent than those archaeological rules enunciated under the ICOMOS International Charter on the Protection and the Management of the Underwater Cultural Heritage (Sofia Charter). The Annex Rules of the 2001 UNESCO Convention were drafted in a way that garners a wider acceptance by the International community. Furthermore, the parties to the convention are also required to apply the rules (standard and rules of maritime archaeology) set out in the Annex for activities that are directed (or indirectly affecting) underwater cultural heritage.<sup>215</sup>

### **2.6.2 Amendment Procedures**

It must be recalled that the Annexed Rules have their origin in the ICOMOS Charter on the Protection and the Management of the Underwater Cultural Heritage 1996,<sup>216</sup> otherwise known as the Sofia Charter. It must also be recalled that the initial ILA Draft (which refers to the ICOMOS Charter), provided flexibility in allowing the rules enunciated in the Annex Rules to be amended from time to time to take regard necessary changes brought about by advances in underwater technology.<sup>217</sup> This flexibility for 'automatic' revision of the Annex Rules vis-à-vis the ICOMOS Charter on the Protection of the Underwater Cultural Heritage 1996 was not retained in the final text of the 2001 UNESCO Convention. Instead, should there be need for any

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<sup>214</sup> See below, para 2.6.2.

<sup>215</sup> See art(s) 7 and 8 of UNESCO Convention 2001.

<sup>216</sup> Ratified by the 11<sup>th</sup> ICOMOS General Assembly in Sofia, Bulgaria, October 1996. See for full text of the Charter at [http://www.international.icomos.org/charters/underwater\\_e.htm](http://www.international.icomos.org/charters/underwater_e.htm). The ICOMOS Charter was also referred to in the initial ILA Draft.

<sup>217</sup> Sec. 15 of the ILA Draft provides that, 'revisions of the Charter by the International Council for Monuments and Sites shall be deemed to be revisions in the annexed Charter, binding on States Party except for those States Parties that notify their non-acceptance to the Director-General of the United Nations Educational, Scientific and Cultural Organisations within six months after the effective date of a revision...'.

amendments to the rules or to any other parts of the Convention, the rather long and complex amending procedures as established under article 31 of the Convention must be followed. As is the case with any other international agreement, such amendment shall only enter into force:

Solely with respect to the States Parties that have ratified, accepted, approved or acceded to them, three months after the deposit of the instruments referred to in paragraph 3 of this article by two-thirds of the States Parties. Thereafter, for each State or territory that ratifies, accepts, approves or accedes to it, the amendment shall enter into force three months after the date of deposit by that party of its instrument of ratification, acceptance, approval or accession.<sup>218</sup>

Amendment procedures prescribed in the Convention are complex and strict. The procedures for proposing amendments are as follows:

A State Party may, by written communication addressed to the Director-General, propose amendments to this Convention. The Director General shall circulate such communication to all States Parties. If, within six months from the date of the circulation of the communication, not less than one half of the States Parties reply favourably to the request, the Director-General shall present such proposal to the next Meeting of States Parties for discussion and possible adoption.<sup>219</sup> Amendments shall be adopted by a two-thirds majority of States present and voting.<sup>220</sup>

The above procedures are very stringent since they apply to all provisions under the Conventions including the Annex Rules. The procedures also require a lengthy time to be effected. One should note that the Annex Rules serves to be the technical guidance on best-accepted international archaeological practice. A time consuming procedures in amending rules, which may no longer be the best practice in dealing with the

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<sup>218</sup> Art. 31(4) of the UNESCO Convention.

<sup>219</sup> Art. 31(1) of the UNESCO Convention.

<sup>220</sup> Art. 31(2).



underwater cultural heritage, might be a luxury the international community could not afford.

### **2.6.3 Establishment of the Scientific and Technical Advisor Body**

The UNESCO Convention does not leave the States to arbitrarily decide on the application of the Annex Rules. Within one year after the entry into force of the Convention, the Director General shall convene a Meeting of States Parties<sup>221</sup> to decide on certain core issues such as its functions and responsibilities. More importantly, it may also 'establish a Scientific and Technical Advisory Body compose of experts nominated by the States Parties'<sup>222</sup> in order to assist the States Parties on 'questions of scientific or technical nature regarding the implementation of the Rules.'<sup>223</sup> The scientific community that exists within ICOMOS member States is an obvious choice candidate for this purpose.<sup>224</sup> In addition, the Annex Rules specifies that 'prior to any activity directed at underwater cultural heritage, a project design for the activity shall be developed and submitted to the competent authorities for authorisation and appropriate peer review.'<sup>225</sup> Although the technical details of such considerations are perhaps best left to the expert consideration of the said 'peer review', the composition of the experts as well as representation of interests (of the users, owners and benefactors of interests) in this review process prior to the authorisation by the competent authority could have been made clearer.

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<sup>221</sup> Thereafter once every two years. Art. 23(3) provides that the Meeting of States Parties shall adopt its own Rules of Procedures.

<sup>222</sup> Art. 23(4).

<sup>223</sup> Art. 23(5).

<sup>224</sup> O'Keefe, above, note. 173.

<sup>225</sup> Rule No. 9 of the 'Annex' of UNESCO Convention 2001.



## 2.7 Dispute Settlement

Disputes relating to 'the interpretation or application of [the] Convention shall be subject to negotiations in good faith or other peaceful means of settlement'.<sup>226</sup> Failing that, disputes 'may be submitted to UNESCO for mediation',<sup>227</sup> by way of an 'agreement between the parties concerned'.<sup>228</sup> The 1982 UNCLOS' mechanisms relating to dispute settlement will apply *mutatis mutandis* if parties fail to settle disputes according to the procedures specified in article 25 of the 2001 Convention and until the UNESCO Convention 2001 comes into force. Dispute settlement mechanisms under the 1982 UNCLOS will generally apply as it will quite some time before the 2001 UNESCO Convention becomes widely ratified by States. By and large, the most pragmatic means of settlement of dispute under UNCLOS 1982 is the enunciation of the principle for States to settle disputes by 'peaceful means',<sup>229</sup> which is achieved 'in a spirit of mutual understanding and cooperation' for 'the maintenance of peace, justice and progress for all peoples of the world'.<sup>230</sup> The Convention also provides that settlement of disputes by peaceful means is to be made possible in accordance with the principle and through the means enunciated in article 2(3)<sup>231</sup> and article 33(1)<sup>232</sup> of the United Nations Charter respectively.<sup>233</sup> Under UNCLOS 1982, the manner in which these methods are to be

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<sup>226</sup> Art. 25(1) of 2001 UNESCO Convention.

<sup>227</sup> The use of the word 'may' implies that States have the discretion to apply this method and when to apply it. According to O'Keefe, although UNESCO has been given a similar role as a mediator under the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970 but this has never been practiced by States (see: O'Keefe, p. 137).

<sup>228</sup> Art. 25(2), *Ibid.*

<sup>229</sup> Article 279 of UNCLOS 1982.

<sup>230</sup> Preamble, UNCLOS 1982.

<sup>231</sup> Article 2(3) of UN Charter provides that 'all members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered'.

<sup>232</sup> The mechanism for dispute resolution under article 33(1) of the United Nations Charter is achieved by way of 'negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice'.

<sup>233</sup> Art. 279 of UNCLOS 1982.

applied can be found in article 279 – 299.<sup>234</sup> Failing these, such dispute is to 'be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.'<sup>235</sup> The choice of forum for this compulsory procedure could either be before any one of the following; the International Tribunal for the Law of the Sea, the International Court of Justice, an arbitral tribunal constituted in accordance with Annex VII or a special arbitral tribunal constituted in accordance with Annex VIII.<sup>236</sup>

## 2.8 The Interim Role of the Convention

The fact that the 2001 UNESCO Convention faces a slow ratification process stalls the development of the new regime protecting underwater cultural heritage. The ILA Committee on Cultural Heritage was of the view that the principal role of the Convention at present 'seems to be as available guidance or inspiration for inclusion of the cultural heritage law in other regimes such as the IMO Convention on salvage of wrecks and the developing regime of a 350 mile continental shelf [as well as] in the development of an integrated coastal zone management for European Union.'<sup>237</sup> Despite of the much confined scope of the role played by the Convention at present, it has already influenced legislators in drawing up mechanism for the underwater cultural heritage protection. In Malaysia, the inclusion of provisions relating the underwater cultural heritage under the newly introduced National Heritage Act 2005 is a good example, for the new legislation was drafted mindful of the developments that

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<sup>234</sup> For a fuller account on UNCLOS 1982 and its dispute settlement mechanism, see; E. D. Brown, 'Disputes Settlement and the Law of the Sea: the UN Convention Regime' (1997) 21 *Marine Policy* 17, A. E. Boyle, 'Dispute Settlement and the Law of the Sea Convention: Problem of Fragmentation and Jurisdiction' (1997) *ICLQ* 37, and A. O. Adede, *The System for Settlement of Disputes under the UN Convention on the Law of the Sea*, 1987, Dordrecht.

<sup>235</sup> Art. 286 UNCLOS 1982.

<sup>236</sup> Art. 287(1) UNCLOS 1982. See also Art. 288 of the 1982 UNCLOS.

<sup>237</sup> ILA Committee of Cultural Heritage Law Report (2004) p. 1, available at <http://www.ila-hq.org/en/committees/index.cfm/cid/13>. The committee gave an example whereby a reference to the preservation of cultural heritage is possible 'in the suggested drawing up of national strategies for integrated management...'

have taken place at UNESCO despite the uncertainty behind the government position regarding its decision for the ratification of the 2001 UNESCO Convention.

## 2.9 Commentary on the Malaysian Position

As gathered from the recommendations made at the Special Workshop organised by the Department of Museums in 2002 to consider the 2001 UNESCO Convention, about the only considerable objection to the Convention rests on issues relating to 'national security'. There are two concerns affecting 'national security'. Firstly, the concern stems from the 'fear' of 'inviting' foreign presence in areas where Malaysia exercises jurisdiction such as the exclusive economic zones, particularly, in light of the *right* of State with 'verifiable link' to be consulted over an underwater cultural heritage found. Secondly, the relevant government department is concerned that such vessels may use underwater cultural heritage activities as a 'cloak' for carrying out 'spying' activities. Can these reasons be reasonably considered valid 'national security' concerns? Other States are mostly unable to accept the 2001 Convention because they feel that the Convention give extended jurisdiction to coastal States not envisaged under 1982 UNCLOS thus affecting the delicate 'balance' of interests to be struck; or that the Convention does not give sufficient jurisdiction in order to achieve the objectives of the Convention. Other States view the Convention as not conferring enough protection to war wrecks found in the territorial waters of a Coastal States. It seems that many reasons can be forwarded to justify not accepting the Convention on the basis of protecting 'national security' interests. Focus must therefore not be lost on the fact that, central to the success of the new Convention is the system of 'cooperation' among States over an underwater cultural heritage. Any 'extended' role by any State would be as 'coordinating' State and any request by a State with a verifiable link should not be seen as impinging upon Coastal State's rights and jurisdiction. In addition, although the Convention confirms the sovereign right of a Coastal State to deal with underwater cultural heritage in its territorial waters, such exercise of rights should respect the

objectives and principles of the Convention and by applying the Annex Rules of the Convention.

On another note, it is heartening that none of the States negotiating the 2001 Convention made an objection to the prohibition of commercialisation of underwater cultural heritage as cultural goods. There have been substantial debate as to the commercial activities that should be considered legal in terms of financing projects which are in line with the Objectives of the Conventions and the Annex Rules, but in principle, States generally agree that underwater cultural heritage shall not be bartered as goods. Similarly in Malaysia, prohibition of commercialisation is not an issue but law and policy on this matter is far from clear. In addition, the recommendation made at the Special Workshop to consider the ratification of the 2001 Convention also did not recommend the government not to accept the Convention for this reason. However, this thesis submits that, such issue is a real obstacle to ratifying the Convention. As will be shown in chapter 3 and 4, Malaysian practice in this regard is weak in prohibiting commercially motivated pursuits.

## **2.10 Conclusion**

While the 2001 UNESCO Convention provides an ideal regulatory mechanism towards resolving problems relating to the protection of the underwater cultural heritage, much of its substantive application in the international waters remains uncertain compounded by its slow ratification by member States and the difficulty in convincing certain maritime powers to reconsider their positions regarding the Convention. The objectives and the principles stated in article 2 of the Convention are probably the heart and soul of the Convention and member States must carefully examine these provisions in taking measures protecting the underwater cultural heritage in order to maintain a correct balance between the competing interests over the discovery or recovery of the heritage. Where the UNESCO Convention abhors commercialisation of the heritage in

express terms, this needs further study. The reality is that, 'commissioning' private salvage company in cooperation projects involving the government is one area that needs further examination if the Convention is to secure a wider ratification. As will be shown in chapter 3, the financial terms of the contractual agreement between the government and private salvage company is ample evidence of the motivation behind recovery projects of underwater cultural heritage.

The political will of States to accept the alleged increase of coastal state jurisdiction as well as the recognition of the interests of States with 'verifiable link' to the underwater cultural heritage will probably be determinant of the continued relevance of the Convention. Henry Cleere noted that 'any movement towards the harmonization and overall upgrading of national legislation can only be to the advantage of those remains and, ultimately, of all mankind, whose collective heritage they represent.'<sup>238</sup> However, as the measure towards harmonization of international the laws relating to cultural heritage protection is making progress in Malaysia, at this juncture, no definite conclusion can be made whether Malaysia is ready to ratify the Convention at the present state, despite its stand to vote in favour of its adoption at UNESCO. The National Heritage Act 2005, which came into force in March 2006, is no doubt a significant step towards harmonising with the objectives and rules of the 2001 Convention. However, more needs to be done by the government, particularly in ensuring that it has the capacity and capability in implementing the objectives of the 2001 Convention and the Annex Rules.

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<sup>238</sup> H. Cleere, *supra* note 32, p. vi.

## CHAPTER 3

### Management of Underwater Cultural Heritage in Malaysia

#### 3.1 Introduction

This Chapter reports on the current state of affairs of underwater cultural heritage and the institutional aspect of underwater cultural heritage governance in Malaysia. The discussion includes the state of maritime archaeology in Malaysia, administration of heritage objects by the Department of Museum and the Heritage Department with a particular study on the administration of certain projects involving the salvage of historic wrecks approved by the National Committee on the Management of Historic Wrecks.

#### 3.2 The State of Maritime Underwater Archaeology in Malaysia

Maritime archaeology in Malaysia is still a relatively young field even though there are potentially a high number of shipwrecks lying around the coasts of Malaysia. According to one study, there are at least 34 major historical wrecks located within Malaysia's territorial water<sup>1</sup> and this number accounts towards wrecks that sank in the Straits of Malacca between 1509 until 1860 alone.<sup>2</sup> However, the number of wrecks provided is only an estimate and the wrecks were identified by a study that was mainly interested with high profile historic wrecks in view of their potential economic gain. Official record on shipwrecks at the Department of Museum and Antiquity on the other

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<sup>1</sup> Territorial waters of Malaysia as determined in accordance with the *Emergency (Essential Powers) Ordinance No. 7 of 1969*. PU(A)307A/1969.

<sup>2</sup> See the list of wrecks in Malaysian waters in Tony Wells, *Shipwrecks and Sunken Treasures in Southeast Asia*, Times Editions, 1995, Singapore, p. 114 – 118.

hand suggests that the number is far greater.<sup>3</sup> This is not surprising since the Straits of Malacca itself is a graveyard of sunken ships during the last 600 years ago or so. According to the Department of Museum and Antiquities, of all the shipwrecks sites, which lie around the coast of Peninsular of Malaysia, only 50 wrecks been properly marked.<sup>4</sup> From these numbers, only a handful has been scientifically researched and surveyed while only some have been salvaged or partially salvaged.<sup>5</sup> Some of the discoveries made have been properly documented, and parts of the salvaged contents of the cargo of the wrecks consisting mainly of china ceramics, cannons and such other artefacts, are now being exhibited at the semi-permanent Malaysian Maritime Archaeology Museum as part of the public educational program introduced by the Department of Museum and Antiquity. The exhibition includes the wrecks of *Nassau*, *Risdam*, *Diana* and the *Desaru*. The exhibition also show cases several other wrecks which collectively represent what is described as the 'once flourishing maritime trade and the evolution of ceramics in Southeast Asia.'<sup>6</sup>

Historical shipwrecks alone are of course not the complete embodiment of Malaysian underwater cultural heritage, although they are seen as an important part of it.<sup>7</sup> Apart from underwater cultural heritage located in the marine coastal area and on the seabed of various maritime zones, the Department of Museum stated that they also include those located in inland rivers and lakes.<sup>8</sup> Malaysian archaeologists are of the view that underwater cultural heritage should also consist of the maritime cultural landscape, which on the whole is comprised of 'network of sailing routes, old as well as new, with

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<sup>3</sup> Information by Encik Khairuddin of the Department of Museum, Kuala Lumpur.

<sup>4</sup> Information by the Department of Museum and Antiquity, Kuala Lumpur.

<sup>5</sup> Hilary Chiew, 'Legislation to Better Govern Salvage of Submerged Wrecks and Their Contents: Sunken Resource Protection', The STAR, 6 March 2000.

<sup>6</sup> See: <http://www.jma.gov.my/muzeum.cfm?cat=4&sub=1>.

<sup>7</sup> The definition of the underwater cultural heritage under the National Heritage Act 2005 recognises the extent of this scope. See; Ch. 4, para 4.3.2, pp. 161-162.

<sup>8</sup> Department of Museums, Kuala Lumpur.



ports and harbours along the coast and its related construction and remains of human activity, underwater as well as terrestrial'.<sup>9</sup> Maritime cultural landscape 'signifies human utilisation (economy) of maritime space by boat; settlement, fishing, hunting, shipping and its attendant subcultures such as pilotage, lighthouse and seamark maintenance.'<sup>10</sup> Thus, sources of Malaysia's maritime cultural landscape would also consist of land remains and names of places. The coast along the Malacca Straits, for instance, highlights a number of sites, which played significant maritime role during the past 5000 years based on archaeological findings.<sup>11</sup> In addition, there are also those discoveries, though not strictly classified as underwater discovery, are nevertheless of historical and maritime significance. Such discoveries are:

- (a) The discovery of ancient townships, forts and burial grounds along the *Johor* river corridor in Malaysia which is a fine example of *Nusantara's* Grand Monuments. These monuments are a symbol of the era of prosperity during the Malacca Sultanate after the Portuguese occupation period.<sup>12</sup>
- (b) The discovery of Midden sites near Seberang Perai in the north of West Malaysia which is fundamentally similar to that of the Midden sites in the East of the Sumatera of Indonesia. It is also a fine evidence of maritime activities in the region thousands of years ago.<sup>13</sup>
- (c) The discovery made at the Langat River near the Kampung Jenderam Hilir in Selangor; West Malaysia, is another evidence of maritime activities in this region. This discovery is more concrete than the earlier one found near Seberang Perai with the discovery of *dayung-dayung sampans* (gliders of small boats)

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<sup>9</sup> Nik Abdul Rahman, N H S., Mohd Ghazali, S., *Sunken Ships and Treasures in the Straits of Malacca: The Archaeological Heritage of the Straits of Malacca*, MIMA Conference on the Straits of Malacca: Building a Comprehensive Security Environment, 11-15 October 2004, Kuala Lumpur.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid, at pp. 3, 16-17.

<sup>12</sup> Information Kit on Historical Monuments and Sites by the Department of Museum and Antiquity available <http://www.jma.gov.my/antikuiti.cfm.cfm?cat=1&sub=1> (date of access: 26/4/2004).

<sup>13</sup> Evans, I.H.N., 'On Ancient Kitchen Midden in province Wellesley', JFMSM, Vol. 15(1), 1930, p. 15-18.



together with Neolithic artefacts and ceramics.<sup>14</sup> This is evidence of the earliest use of *sampans* in the Peninsular of Malaysia.

- (d) The discovery of archaeological remains in *Lembah Bujang* (The Bujang Valley) in Kedah of Peninsular Malaysia, which are evidence of the role played by the Kedah Sultanate in international trade in the region.<sup>15</sup>

With due regard to the significance of archaeology in mapping the true account of history and human activities, evidence of maritime history is not only to be found under the waves of the ocean, or on inland areas near rivers and lakes. Other document-based sources such as the Shipping Lists of Malacca during the Dutch occupancy between the 17<sup>th</sup> and 18<sup>th</sup> century,<sup>16</sup> is still an indispensable record of the early Southeast Asian and Malaysian history in trade and maritime transport. One commentator concluded that; 'historical information and data from archival sources, whether new or rediscovered, usually create less public interest or drama when compared to archaeological discoveries or salvage work on sunken ships. Yet, from the scholarly point of view, these documentary sources have just as much significance, if not perhaps of much greater use.'<sup>17</sup>

### 3.3 The Distribution of Power between the Federal and State Government

#### 3.3.1 Federal and State Government Administration

Malaysia is a Federation of thirteen States<sup>18</sup> and three Federal Territories.<sup>19</sup> The Federation is ruled by The *Yang Dipertuan Agong* (The Supreme Head)<sup>20</sup> who is elected

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<sup>14</sup> Batchelor, B., 'Post-Hoabinhian coastal settlement indicated by finds in Stanniferous Langat river alluvium near Dengkil, Selangor, Peninsular Malaysia', *Federation Museums Journal*, Vol. 22, 1977.

<sup>15</sup> Information by the Department of Museum and Antiquity.

<sup>16</sup> Lee Kam Hing, 'The Shipping List of Dutch Melaka: A Source for the Study of Coastal Trade and Shipping in the Malay Peninsula During the 17<sup>th</sup> and 18<sup>th</sup> Century', p. 53-76, in *Kapal dan Harta Karam*, Universiti Malaya, 1985.

<sup>17</sup> *Ibid*, p. 53.

<sup>18</sup> See Art. 1(2) of the Federal Constitution. The 13 States are: Selangor, Negeri Sembilan, Johor, Pahang, Perak, Kedah, Terengganu, Kelantan, Perlis, Melaka, Pulau Pinang, Sabah and Sarawak.

by the *Majlis Raja-Raja* (Council of Rulers) by way of rotation from amongst the State *Sultans*.<sup>21</sup> This is a feature unique to the Malaysian Monarchy. The Federal Constitution requires the *Yang Dipertuan Agong* to act on the advice of the Prime Minister who is the leader of the Executive branch of the government. The legislative branch of the government is the Parliament,<sup>22</sup> which is comprised of the *Dewan Rakyat* (House of Representatives) and the *Dewan Negara* (Senate). Each of the States within the Federation has its own State Constitution, State Legislature and a State Government. As is the case with any other Federation, there is a need for a clear distribution of power between State constituencies and the Federal government.<sup>23</sup> For this purpose, the Federal Constitution<sup>24</sup> provides a list of legislative matters for the Federal government (the Federal List), those of the State Governments' (the State List) and those that could overlap, thus shared by the two governments (the Concurrent List).<sup>25</sup> This legislative relationship between the Federal and the State governments is described in Article 74 of Federal Constitution in the following terms:

(1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule

(2) Without prejudice to any power to make laws conferred on it by any other Article, the Legislature of a State may make laws with respect to

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<sup>19</sup> Federal Territories of Kuala Lumpur, Labuan and Putrajaya. All established under the Constitution (Amendment) (No. 2) Act 1973 (Act 206); the Constitution (Amendment) (No. 2) Act 1984 (Act A585); and the Constitution (Amendment) Act 2001 (Act A1095) respectively.

<sup>20</sup> The current King is Tuanku Syed Sirajuddin Syed Ibni Almarhum Tuanku Syed Putra Jamalullail (King of Perlis).

<sup>21</sup> Selangor, Negeri Sembilan, Johor, Pahang, Perak, Kedah, Terengganu, Kelantan and Perlis.

<sup>22</sup> Malaysian Parliament website at <http://www.parliament.gov.my>.

<sup>23</sup> The use of the word 'State' in this Chapter will mean a State within the Federation unless otherwise stated.

<sup>24</sup> Act 000.

<sup>25</sup> See generally the Ninth Schedule of the Federal Constitution.

any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List

Parliament may, however, make laws with respect to matters enumerated in the State list for the purpose of implementing an International treaties, agreements or conventions, to be entered into by the Federal government with another country,<sup>26</sup> or to promote uniformity of the laws of the States within the Federation.<sup>27</sup> Parliament may also make laws in respect of State list matters, if so requested by the State legislative assembly.<sup>28</sup> In the event of inconsistency between the Federal and State laws, 'the Federal law shall prevail and the State law shall, to the extent of the inconsistency be void.'<sup>29</sup> Matters relating to 'antiquities' fall under the Federal List<sup>30</sup> except in the states of Sabah and Sarawak, where antiquities remain within the State government's legislative powers.<sup>31</sup> However, as far as matters relating to jurisdictions at sea are concerned, they fall within the jurisdiction of the Federal government. In addition, the Federal Constitution also provides certain other matters under the Federal list, which may have impact on the protection of underwater cultural heritage. They are:

- a) Shipping, navigation and fisheries; these shall include 'shipping and navigation on the high seas and in tidal and inland waters, ports and harbours, foreshores, lighthouses and other provisions for the safety of navigation, maritime and estuarine fishing and fisheries, excluding turtles, light dues, wrecks and salvage.'<sup>32</sup>
- b) Tourism<sup>33</sup>
- c) Admiralty Jurisdiction<sup>34</sup>

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<sup>26</sup> Art. 76(1)(a) of the Federal Constitution.

<sup>27</sup> Art. 76(1)(b), Ibid.

<sup>28</sup> Art. 76(1)(c), Ibid.

<sup>29</sup> Art. 75, Ibid.

<sup>30</sup> Item 2(e) of the Ninth Schedule, Ibid.

<sup>31</sup> See below paragraph 3.2.2 (Item 2(e) of the Ninth Schedule)

<sup>32</sup> Item No. 9 of List I of the Ninth Schedule of the Federal Constitution.

<sup>33</sup> Item 25A of List I, Ibid.

However, as far as land matters are concerned, they fall within the jurisdiction of individual States within the Federation. Item No. 2 of the Ninth Schedule of the Federal Constitution provides that, except with respect to the Federal Territories of Kuala Lumpur, Labuan and Putrajaya, all land matters including the following matters, shall be within the jurisdiction of State governments:

- (a) land tenure, relation of landlord and tenant; registration of titles and deeds relating to land; colonisation, land improvement and soil conservation; rent restriction;
- (b) Malay reservations, or, in the States of Sabah and Sarawak, native reservations;
- (c) Permits and licences for prospecting for mines; mining leases and certificates; Compulsory acquisition of land
- (d) Transfer of land, mortgages, leases and charges in respect of land; easements; and
- (e) Escheat; treasure trove excluding antiquities

Item 2(e) of the Ninth Schedule above clearly excludes antiquities from the State jurisdiction except in the case of Sabah and Sarawak. However, in 1988, the Federal Constitution was amended in order to vest the State governments also with the power to legislate on the preservation of cultural properties within their territories.<sup>35</sup> The amendment came in the form of insertion of Item 12A in the State List of the Ninth Schedule for the regulation of matters pertaining of 'libraries, museums, ancient and historical monuments and records and archaeological sites and remains, other than those declared to be federal by or under federal law.' In light of this change, in terms of the protection of historic sites and buildings, the responsibility of the Museum Department, under the now repealed Antiquities Act 1976, concentrated on the protection of cultural heritage of national significance. The participation of State governments and local councils in the preservation of cultural heritage is governed

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<sup>34</sup> Item 4(j) of List I of the Ninth Schedule of the Federal Constitution.

<sup>35</sup> Constitution (Amendment) Act 1988 (Act A704). See Item No. (12) Amendment to the Ninth Schedule.

through the implementation of the Local Government Act 1976<sup>36</sup> and the Town and Country Planning Act 1976.<sup>37</sup>

After the 1988 Constitutional Amendment, four States enacted specific laws relating to the protection and conservation of cultural heritage. These are the Johor Heritage Foundation Enactment No. 7 1988, Malacca Preservation and Conservation of Cultural Heritage Enactment 1988, Sabah Cultural Heritage (Conservation) Enactment 1997 and Sarawak Heritage Ordinance 1993. These laws have specific objectives and are of limited geographical application. Under these laws, the Local Authority is vested with jurisdiction for the control, enforcement, development, preservation and conservation of established areas.<sup>38</sup> The Local Authority does so by maintaining a register of all cultural heritage and conservation area, which have been declared as such.<sup>39</sup> The State Authority also formulates and publishes proposals and programs for the preservation or conservation and enhancement of cultural heritage or conservation area within its locality.<sup>40</sup>

It is not always possible to segregate the legislative powers of the Federal and State governments. Consequently, responsibilities over certain matters are concurrently shared between the Federal and the State governments. Two concurrent list matters, which have an impact on the protection of historic environment, are matters pertaining to town and country planning<sup>41</sup> and culture.<sup>42</sup> Prior to the constitutional amendment in

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<sup>36</sup> Act No. 171.

<sup>37</sup> Act No. 172.

<sup>38</sup> Section 5 of the Malacca Enactment No. 6 of 1988 on the Preservation and Conservation of Cultural Heritage.

<sup>39</sup> See for example: Section 6 of Malacca Enactment No. 6 of 1988, and section 6(1) Sabah Cultural Heritage (Conservation) Enactment 1997.

<sup>40</sup> Section 7 of the Malacca Enactment No. 6 of 1988.

<sup>41</sup> Except in the Federal Capital. See: Item 5 of List III, Federal Constitution.

<sup>42</sup> Item 9B of List III, Federal Constitution.

January 2005 to include 'cultural heritage' in the Concurrent List, cultural heritage was neither in the Federal nor in the State list. If 'cultural heritage' refers only to those type of man-made heritage as defined by the various State legislation mentioned below<sup>43</sup> then they are clearly a case within the remit of the State governments' power to legislate upon. However, since the correct understanding of cultural heritage also extends to the intangible form of heritage,<sup>44</sup> it would clearly need to be a matter within the Concurrent List.<sup>45</sup>

### 3.3.2 Jurisdiction over Underwater Cultural Heritage

A very important observation here is that the Federal Constitution provides that matters pertaining to 'treasure trove' as well as 'monuments' and other built heritage shall be within the legislative power of the State government. Whereas, 'antiquities', 'salvage' and 'wreck' are matters for the Federal government except in the case of Sabah and Sarawak, where the State governments retain control over objects of antiquities. Under current arrangement, matters pertaining to underwater cultural heritage lie within the jurisdiction of the Federal government as far as the Peninsular of Malaysia is concerned. Treasure trove, however, is not. This is based on the understanding that treasure trove is principally a land matter and not to be considered as underwater cultural heritage although treasure trove itself could be something hidden on a bed of a lake, for instance. A major component of underwater cultural heritage comes in the form of historic wrecks, which come under the Federal List of 'wrecks and salvage'. Coastal cultural landscape, on the other hand, is under the jurisdiction of the individual States concerned as matters pertaining to 'land' and other 'land improvement and soil conservation' are under the State List.<sup>46</sup> In other words, issues relating to the protection of underwater cultural heritage in the wider sense will

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<sup>43</sup> Ch. 4, at para 4.3.1.

<sup>44</sup> On the definition of cultural heritage, Ch. 4, para 4.3.1.

<sup>45</sup> Above, Item 9B List III.

<sup>46</sup> Item 2 of Ninth Schedule.

is a shared responsibility between the Federal and State governments concerned. However, protection over 'historic wrecks' located within the 3 nautical miles from the baselines falls within State jurisdiction.

### **3.4 The Administration of Cultural Heritage**

#### **3.4.1 Ministry of Arts, Culture and Heritage**

The Ministry of Arts, Culture and Heritage is responsible for the formulation of policy and laws pertaining to the protection and conservation of historic and cultural environment including the underwater cultural heritage. Previously, such matters fall in the then Ministry of Arts, Culture and Tourism. Following a cabinet reshuffle on 27 March 2004, the Ministry of Art, Culture and Tourism is now divided into two different Ministries; the Ministry of Arts, Culture and Heritage and the Ministry of Tourism. The Ministry of Arts, Culture and Heritage is not the only Government Ministry that is responsible in the management of historic environment in Malaysia. There are other government Ministries and agencies that will together take part in the implementation of government policies relating to this matter. As far as underwater cultural heritage is concerned, this is reflected in the membership of the *Jawatankuasa Kapal Karam Bersejarah* (National Committee on the Management of Historic Shipwreck) chaired by the Head Secretary of the Ministry of Arts, Culture and Heritage. The membership consists of representatives from the Department of Museum and Antiquity, Ministry of Transport, Ministry of Defence, Ministry of Foreign Relations, Department of Oil Gas and Mineral, Attorney General and State Representatives.

#### **3.4.2 Heritage Department**

In the past, matters within the ambit of the National Committee is handled by International Affairs Division within the Ministry but such matters now in the hand of the recently established Heritage Department under the Ministry of Culture, Art and Heritage, headed by the recently appointed Commissioner for Heritage, pursuant to the



National Heritage Act 2005. Three sub-divisions, i.e., the custom and artefacts branch, monument and nature branch as well as the control and resource branch assist the work of the Commissioner of Heritage. The last two sub-divisions work together in formulating government policies pertaining to the protection of historic environment including underwater cultural heritage. Control and Resource sub-division is primarily responsible for drafting law and policy of cultural heritage as well as the enforcement of such laws and rules. They implement, coordinate, facilitate and evaluate research activities relating to heritage, compiling the finding of such research as well as in coordinating and in planning matters relating to cultural heritage management and administration. The greater success of their work in relation to underwater cultural heritage depends on the technical assistance of the Department of Museums. In July 2007, the Heritage Department launched the newly established National Heritage Register, which is accessible online.<sup>47</sup> It features first 50 national heritage items listed on the register but none so far included any of the underwater cultural heritage recovered to date.

### **3.4.3 The Department of Museums**

The Department of Museums<sup>48</sup> assumes the most important role as guardian of national cultural heritage and in educating the public on matters pertaining to national cultural heritage. Its establishment took place soon after independence in 1957, and at that time, it was placed under the then Ministry of Culture, Youth and Sports. The Department of Museums was only officially established on 11 March 1993 (then the Department of Museum and Antiquity) to reflect changes within relevant government Ministry as mentioned above.<sup>49</sup> The Department now comes under the umbrella of the Ministry of Culture, Arts and Heritage. The role of the Department is not only confined to the

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<sup>47</sup><http://www.warisan.gov.my/jwn/>.

<sup>48</sup> Previously known as the Department of Museum and Antiquity (up till 2004) and before that, as the Federation of Malaya Museum.

<sup>49</sup> Above, para 3.4.1.

traditional role of museology activities such as collecting, documenting, preserving, displaying and disseminating information on cultural heritage or the more economically oriented role in encouraging tourism and tourism related activities in the country. More importantly, it bears the responsibility of regulating 'matters pertaining to excavation, preservation, conservation, maintenance and in gazetting of archaeological sites and historical monuments and regulating antique dealers and the export of antiquities as provided under the Antiquities Act 1976.'<sup>50</sup> However, as noted earlier, these duties have been taken over by the Commissioner of Heritage.

The Department of Museum and Antiquities maintained a list of sunken vessels dating from 1000 to 1900 and it contains information on the location of the particular wreck and a brief description of their cargo.<sup>51</sup> This document is withheld from the public consultation for security reasons and for fear of the treasures being plundered.<sup>52</sup> The Museum departments and marine archaeologists in Malaysia work closely together,<sup>53</sup> actively campaigned for a better understanding of humankind's civilisation, but their work on terrestrial archaeology outweighs that of their work in underwater and maritime archaeology. In maritime archaeology, work is focused on studying the way ships were 'built and armed' and by analysing cargos' contents and other objects found together with the shipwrecks as these would reveal information of historical and cultural value of a particular era. Data from the scientific study would then be reported and documented. As far as physical possession of the artefacts is concerned, such

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<sup>50</sup> Adi Haji Taha, *Cultural Heritage and The Role of the Department of Museums and Antiquity*, JMA (undated, online article) [http://www.jma.gov.my/sudut\\_details.cfm?cid=4622EF41-21B2-4368-996717359E34E625](http://www.jma.gov.my/sudut_details.cfm?cid=4622EF41-21B2-4368-996717359E34E625).

<sup>51</sup> It could not be ascertained at this moment whether such list is being maintained the Department of Heritage or still being kept by the Department of Museums.

<sup>52</sup> Hilary Chew, *Legislation to Better Govern Salvage of Submerged Wrecks and Their Contents*, The STAR, 6 March 2000.

<sup>53</sup> In Malaysia, marine archaeologists are attached as Curators at the Department of Museum, or holding professorial posts at public universities; National University of Malaysia, University of Malaya and University Sains Malaysia.

endeavour also contributes towards an increase in the collection of important archaeological objects of national and regional museums.<sup>54</sup> The Department of Museums also oversees the administration of museums in the West Malaysia. The States of Sabah and Sarawak have their own Department of Museum and Antiquity,<sup>55</sup> who act as the 'custodian and keeper of all the historical documents and artefacts of the people of Sarawak and Borneo as a whole'.<sup>56</sup>

Prior to the National Heritage Act 2005, the Department of Museum's law and enforcement division was responsible in supervising activities that involve cultural properties of national interest and matters pertaining to the administration of the Antiquities Act 1976. This department was concerned with the administration of excavation licensing system and export applications including and to ensure that the conditions specified in the licences are complied with. In particular, the department was responsible for the following matters:

- a) the approval of antiquities export licence
- b) the approval of antiquities dealer's licence
- c) the approval of antiquities excavation licence
- d) the approval of application for the renovation of old buildings and historical sites
- e) to gazette historical monument and historical sites
- f) to process the payment of compensation for reported archaeological find
- g) the coordination of application of salvage permit for underwater archaeological excavation. In this case, National Committee for the Management of Historic Wrecks makes the initial approval.

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<sup>54</sup> Ibid.

<sup>55</sup> The responsibilities and functions of Sarawak State Museum are enshrined in the Sarawak Cultural Heritage Ordinance 1993.

<sup>56</sup> See: <http://www.museum.sarawak.gov.my/mudepart.htm> (last visited 25 April 2008).

In enforcing relevant regulations pertaining to trade and dealings in antiquities, the division worked in close cooperation with the Royal Customs and Excise Department, Royal Malaysian Police, District Officers (in the case of State lands) as well as *Penghulus* (Heads of a Mukim/District) by conducting spot checks on antique shops and in confiscating artefacts suspected to be excavated through illegal diggings. This had been a workable arrangement so long as full cooperation can be obtained from all government enforcement agencies. According to the Museum Enforcement Division, there was the problem of enforcing the laws since they were dependent on the other agencies such as the Police, Immigration and Custom Department, due to among other things, lack of manpower within the Department concerned. In the state of Sabah, for instance, such problem in managing underwater cultural heritage is particularly obvious in difficult maritime areas, such as those that are of 'close proximity to the Philippines and other numerous islands off-shore which provide several points of entry and exit along the coast'.<sup>57</sup> Thus, enforcement measures in vulnerable areas are difficult to perform, if not impossible.

In total, there are 50 museums in Malaysia, administered at the Federal, State, and institutional level. All States in the Federation have at least one museum catering for specific purpose but all of them play very significant role in collecting and preserving Malaysian cultural and historical heritage. At the apex of these museums is the National Museum (*Muzium Negara*) established in 1963 by the Government as a custodian of national cultural interests. The main objective of its establishment is 'to make the *Muzium Negara* a repository of Malaysia's rich cultural heritage and also to utilise the collection for imparting visual education'.<sup>58</sup> The realisation of this objective is carried out through permanent as well as temporary exhibitions. There are two

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<sup>57</sup> Information by Mr. Peter Koon of the Sabah State Museum.

<sup>58</sup> Mohd Yatim, Dr. Othman, *The Role of Museums in the Preservation of Cultural Heritage: The Malaysian Experience*, PURBA, Jurnal Persatuan Muzium Malaysia, Bil. 6 (1987), pp. 1-2.

museums in Malaysia that are specifically established with Malaysian underwater archaeology in mind. First is the Maritime Museum of Archaeology in Kuala Lumpur. At this moment, the museum is still a semi-permanent establishment. It is hoped to be turned into a fully established maritime archaeology museum.<sup>59</sup> It was first opened for the public on 15<sup>th</sup> November 2001 but the exhibition has been extended yearly and most recently extended until 31 December 2005.<sup>60</sup> It is the first in the world that showcases artefacts from the 10 shipwrecks (covering the period of early 14<sup>th</sup> century Malacca Sultanate until the late 19<sup>th</sup> century) discovered in the waters off the coast of West Malaysia. The second one is the Maritime Archaeology Museum in Malacca. This museum was established in 1995 as a non-profit cultural organisation<sup>61</sup> and as an institutional membership of International Council of Museum (ICOM). Its objectives are to recreate real-life form the Malay maritime heritage ('material evidence of people and their environment') and seek for the advancement of 'the interests of museology and other disciplines concerned with the museum management and operation'.<sup>62</sup> The museum itself was architecturally modelled after the infamous shipwreck of *Flor dor Mar* a Portuguese vessel was purportedly lost within Indonesia's territorial waters laden with cargoes containing national treasures robbed by the Portuguese soldiers from the Malacca's Sultanate during their siege of Malacca Kingdom in the early 14<sup>th</sup> century.<sup>63</sup> The exhibits in this museum consist of some artefacts from the wrecks of *Royal Nanhai*, *Xuande*, *Longquan*, *Turiang* and *Nanyang*.<sup>64</sup>

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<sup>59</sup> Currently, the semi-permanent museum is being moved to another location in the State of Negeri Sembilan for establishment of permanent museum of maritime archaeology.

<sup>60</sup> The museum is in the process of being moved to another location.

<sup>61</sup> MAM Information Center, No. 11B, Jalan Melaka Raya II, Taman Melaka Raya, 75000, Melaka, Malaysia.

<sup>62</sup> See; maritime museum website at [http://www.mam-museum.com/mam\\_intro.html](http://www.mam-museum.com/mam_intro.html) (last visited on 2 May 2004).

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

#### 3.4.4 Other Governmental Departments and NGOs

Other governmental departments at the Federal and State level, which are concerned with the preservation of heritage are the National Archive Department, the Institute of Language and Literature Malaysia, the State Departments of Arts, Culture and Heritage, the Department of Environment, the Department of Wildlife and National Park Peninsular Malaysia, Department of Forestry as well as the Department of Mineral and Natural Resources.<sup>65</sup> Apart from these governmental departments, there are a number of non-governmental organisations, which are concerned with the management of the national heritage in Malaysia, namely, the Heritage of Malaysia Trust, Penang Heritage Trust, Malacca Heritage Trust, Perak Heritage Society, Malaysian-Dutch Eurasian Association, Children's Environmental Heritage Foundation, Center for the Study and Documentation of Traditional Performance, the Leboh Aceh Malay Mosque Heritage Trust, WWF Malaysia and the Malaysia Nature Society. Badan Warisan in particular plays a significant role in the promotion of the preservation and conservation of Malaysian heritage. Its formation as a non-governmental organisation in 1983 was made in view of promoting the 'sympathetic adaptation to new uses (of historic environment) so that to ensure their future viability and relevance.'<sup>66</sup> Much credit is due to this Organisation for their efforts in lobbying for a more effective system in the governance of national heritage most recently in efforts leading to the drafting of the Cultural Properties Bill under the leadership of the late Tan Sri Harun Hashim.<sup>67</sup> However, most of these non-governmental organisations including Badan Warisan, are organisations established mainly for the purpose of preserving terrestrial historic environment and not the underwater ones. This leaves the Department of Heritage, Department of Museums in Kuala Lumpur as well as the

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<sup>65</sup> Government organisations at State levels include the Melaka Museums Corporation, Johor Heritage Foundation, Pulau Pinang Heritage Centre as well as State zoos.

<sup>66</sup> Information by Badan Warisan at <http://www.badanwarisan.org.my/about>.

<sup>67</sup> The Completed Draft of Cultural Properties Bill will not be tabled at all as the Ministry of Arts, Culture and Heritage has recently proposed a more comprehensive stand alone law on Preservation of Heritage.

Department of Museum in the State of Sabah and Sarawak to deal with the management of the underwater cultural heritage.

### 3.5 The National Committee on the Management of Historic Wrecks in Malaysia<sup>68</sup>

#### 3.5.1 Establishment

The National Committee for the Management of Historical Shipwrecks is neither a statutory body nor an independent organisation.<sup>69</sup> It was established in 1988 under the auspices of the Ministry of Finance through the *Keputusan Mesyuarat Jemaah Menteri* (Cabinet Meeting Papers) of 22<sup>nd</sup> June 1988. The establishment of this Committee is primarily to consider proposals for survey and recovery activities targeted at 'historic wrecks' and artefacts or objects associated with such shipwrecks. It must be noted that prior to the establishment of the Committee, many of such activities were carried out illegally. A major highlight was the site of the *Desaru* wreck, which was excavated without permission from the relevant government agency. As a result, many cultural heritage of national importance were looted and taken out of the country. The Cabinet meeting of 22<sup>nd</sup> June 1988 resolved that, all matters pertaining to the application to conduct survey and salvage of shipwrecks must be first referred to the Ministry of Finance. Further, on 6<sup>th</sup> July 1994 the Cabinet also took note that the Ministry of Finance would provide standard guidelines for the purpose of survey and salvage of historical wrecks.

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<sup>68</sup> All information contained in this section is obtained through an interview dated 15 April 2004 with Tuan Haji Khairuddin, Senior Curator, Enforcement Division, Department of Museums and Antiquities, Malaysia.

<sup>69</sup> Compare, for instance, with the Advisory Committee on Historic Wrecks in the United Kingdom which has been described as a 'quango'; See: Dromgoole, S. 'Protection of the Historic Wreck: the UK Approach (Part I): the Present Legal Framework', (1989) *Int'l J. Estuarine & Coastal Law* 26, at 40. See also general info on the committee at: <http://www.english-heritage.org.uk/server/show/nav.001002003007002002> (undated, last visited 13/11/2005).



The National Committee for the Management of Historical Shipwrecks' guideline on survey and salvage of historical shipwrecks mentions very briefly the application of the Merchant Shipping Ordinance 1952. Whilst the Ordinance provides extensive provisions on salvage procedures and rewarding system, it does not make any reference to role and function of the National Committee in relation to historic wrecks or any other wrecks. Until the application of the Merchant Shipping Ordinance to historic wrecks is expressly excluded by legislation, salvage rules and other aspects concerning wrecks under the Ordinance will continue to be applicable to historic wrecks.

### 3.5.2 The Committee Membership

Prior to the transfer of the National Committee being chaired under the Ministry of Finance to the Ministry of Arts, culture and Tourism, the Committee is chaired by *Setiausaha Bahagian Pengurusan Perolehan Kerajaan* (Secretary of the Government Acquisition Department) and it is now chaired by Secretary of the Ministry of Arts, Culture and Heritage and the other members consist of representatives from:

- a) Ministry of Arts, Culture and Tourism<sup>70</sup>
- b) Department of Museum and Antiquities
- c) Attorney General Chambers
- d) Marine Department of Peninsular Malaysia
- e) Foreign Ministry (if it involves any activities or discoveries outside the Malaysian Contiguous Zone) and
- f) Ministry of Transport.

A Special Technical Committee was also further established to study and provide guidelines regarding the discovery and excavation of historic wrecks and it consists of representatives from all the above stated Ministries and government Departments.

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<sup>70</sup> Now the Ministry of Culture, Arts and Heritage. Ministry of Tourism is another separate entity.

Looking at its membership,<sup>71</sup> the committee represents various interests associated with the exploitation of the heritage although the major trustee of the heritage seems to be the Department of Museum and Antiquities. Two issues are to be noted here. Firstly, it is strange that the membership of the Department of Fisheries is not secured as a number of the significant discoveries of wrecks were discovered by fishermen by accident. Secondly, although the specific mandate of the Committee is to consider the application for the discovery and salvage of historic wrecks, it is not clear if the Committee is also empowered to give directions or propose the search and salvage of historic wrecks. There is also no provision whether the government itself could become the salvor.

### 3.5.3 Special Committee Guidelines<sup>72</sup>

The guidelines produced by this Special Committee cover the following aspects:

- a) Interpretative statement on the Antiquities Act 1976 (Act 168) and the Merchant Shipping Ordinance 1952. This interpretative statement is, however, classified information.<sup>73</sup>
- b) An outline of procedures for survey works and salvage of shipwrecks. This includes procedures for survey and salvage application, method of work, dealing and disposal of artefacts and other related objects, conservation work of artefacts, documentation thereof and preparation of report.
- c) Identification of responsible authorities for the purpose of considering application and approving survey works and salvage of historical shipwrecks. Applications for survey activities must be submitted to the Marine Department supported by a reference from Department of Museums and Antiquities (after the National Heritage Act 2005,

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<sup>71</sup> It is strange that membership from the Department of Fisheries is not sought since many of the significant discoveries of historic wrecks were accidentally found by fishermen.

<sup>72</sup> Researcher was not given permission to study the details of the guidelines by the Department of Museum and Antiquity.

<sup>73</sup> It is not clear why this is such a classified information.

the Heritage Department), whereas, application for salvage work must be made direct to the Department of Museums (the Heritage Department).

d) Services Contract and Profit Sharing Contract which are based on a 'No Find No Pay'<sup>74</sup> principle for all survey activities and salvage works.<sup>75</sup>

e) An outline for salvage procedures and process for historical wrecks as well as on dealings and the sale of artefacts and the distribution of profit, if any.

In conformity with the special guidelines, the Advisory Committee will consider and process all applications pertaining to surveys of historical wrecks under the following terms:

- a) To consider for approval or refusal of the application for all surveys of historical wrecks within Malaysian territories based on the above guidelines.
- b) To consider and to make appropriate recommendation for all salvage works and to determine terms of the contracts for services and profit sharing for the approval of the Ministry concerned (now the Ministry of Culture, Arts and Heritage).
- c) To negotiate on the best possible method for the disposal of artefacts and the rate of profit sharing for the approval of Ministry of Finance.
- d) That all decision pertaining to surveys works and salvage must be unanimous.<sup>76</sup>

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<sup>74</sup> It is normally accepted that under this principle the salvor will receive no salvage reward if his efforts are in vain or if the property is of little value or no value. It has been argued this principle 'ignore[s] the benefits conferred upon vessel owners by salvors whose efforts may result in the owner's avoidance of tremendous liabilities (especially to the environment and to third parties), even though the salvors do not succeed in saving anything of value.' See: White, S. 'Salvage Convention 1989: Rewarding Efforts to Protect the Environment' (2002) at [http://www.vesselassist.com/SWhite\\_salcon89.html](http://www.vesselassist.com/SWhite_salcon89.html) (last visited 13/11/2005).

<sup>75</sup> Note these two different kinds of contracts. Contract are classified as Official Secret document and the researcher was unable to refer to these documents for further details.

<sup>76</sup> According to Tuan Haji Khairuddin, this term has proven to be problematic since it creates a birocratic red tapes that hampers urgent surveys and salvage, while in the meantime, looters have already begun illegal activities on the shipwreck sites.

- e) Any decision that was not reached unanimously which requires further negotiation must be referred to the Ministry of Finance for decision.
- f) The Committee is to coordinate all survey activities and salvage of historical wrecks in Malaysian waters.<sup>77</sup>

In the event that the National Committee concludes that a recovery project is viable, the parties will proceed with the negotiation process including the terms and conditions to govern the salvage process and the disposal or sale of artefacts. In summary, the initial planning of the salvage process mainly involves the following steps:

- a) On the Barge
  - i. To identify the parties (Salvor and Government concerned)
  - ii. Salvor is to conduct a Preliminary Assessment (PA) for assessing initial insurance.
  - iii. Salvor is to bring all recovered artefacts to a safe storage location (on land) for safekeeping
- b) Temporary Storage (warehousing)
  - i. Salvor bears the responsibility on all security aspects of the recovered artefacts
  - ii. Salvor is to move recovered artefacts to a suitable conservation location
- c) Conservation and Restoration
  - i. The Government will determine the conservation location
  - ii. Salvor will carry out conservation works (with government supervision)

Clearly, there is the assumption of risk and economic gain and the application of the 'no cure no pay' principle in the partnership arrangement. The Committee's consideration

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<sup>77</sup> Malaysian waters refers to inland waters, internal waters, contiguous zones and the exclusive economic zone.

for salvage operation, fees and formula for the distribution of Profit is roughly outlined below.<sup>78</sup>

d) Appraiser and the Final Appraised Value (FAV)

- i. Two professional appraisers will be chosen. One will be appointed by the Government and the other by the Salvage Company.
- ii. FAV will be determined after due completion of conservation and restoration works and after careful study of the finds recovered.
- iii. Both of the appraisers are free in assessing each item to be valued.
- iv. Where the difference between the two valuations is approximately around 10% +/- the higher value will be considered as the FAV. For example:

Appraiser A gives a RM2000 evaluation<sup>79</sup>

Appraiser B gives a RM1850 evaluation

$RM2000 - RM1850 = RM150$

$150/2000 \times 100 = 7.5\%$

In this case, Appraiser A's valuation is considered FAV

- v. Where the difference is above 10%, simple averaging will be followed. This means the two valuations will totalled and will be divided by two to achieve FAV for fairness and to avoid future conflicts in terms of profit sharing.
- vi. FAV will also be used for the purpose of determining sum insured value of each item.

e) Sale of Artefacts

The Government reserves the right to dispose of any cultural property it deems necessary for the performance of duties specified under the laws.<sup>80</sup> Once a

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<sup>78</sup> Para (d) – (e) below.

<sup>79</sup> RM stands for Ringgit Malaysia

decision has been made by the Director-General of the Department of Museums (now the Heritage Commissioner), on the issue of sale of such artefacts, the following terms are referred to by the Special Committee in determining the costs incurred in engaging salvage services from appointed salvage service provider as well as on calculation of profits for services rendered:

- i. Principally, the government reserves the right to choose and take possession of items not more than 10% of the FAV amount. Any payment is usually made on a cost-sharing basis. For this purpose, it means that 10% of the FAV of each chosen item will be considered as salvage costs for the said item.
- ii. Should the government wish to take possession of more than 10% of the FAV, each item will be purchased at the amount of 50% from the FAV of each item.
- iii. The rest of the artefacts / items will be sold to the Salvor and it is up to the Salvor to appoint a reputable auctioneer and to sell or dispose of the artefacts either through an open sale, tender or an auction subject of course to the following terms:
  - a. Although it is up to the Salvor to appoint an auctioneer, the appointment itself must be done with prior consent of the Government.
  - b. Initial interim payment in cash or by a bank guarantee (apart from an execution bond of 5%) is levied on the Salvor based on 5% of the agreed FAV after due completion of conservation work before those artefacts are handed over to the Salvor.
  - c. All costs involving transportation, security, insurance, publicity, campaign, catalogues and sales process including the costs incurred

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<sup>80</sup> See the powers of Heritage Commissioner as provided under sec. 7 of the National Heritage Act 2005 and previously, sec. 3 of the Antiquities Act 1976.

by the appointment of an auctioneer are borne by the Salvor. It must be noted that the ownership of these artefacts at this stage is shared interim between the government and the Salvor. The government however, reserves the right to bear costs based on profit sharing as far as transportation and insurance are concerned. Other costs are subject to negotiation.

- d. Although the appointment of an auctioneer is the responsibility of a Salvor, the government consent on the appointment must first be obtained and all the terms of agreement between the Salvor and the auctioneer must secure Government approval.
- e. All items which remain unsold will be distributed between the government and the Salvor according to the distribution of gross revenue as will be explained below.<sup>81</sup> This distribution is done in kind (physical) and not in cash.
- f. It is the responsibility of the Salvor to prepare a final account supported by all relevant documents concluding the sales of the artefacts. This will be done according to several different accounts; (i) sold artefacts, (ii) artefacts which are not for sale and (iii) the remaining unsold artefacts (which were classified for sale) for the purpose of closing of account. These will take consideration of the interim payment already made earlier.<sup>82</sup> These accounts are prepared based on a successful sale/auction. They are to be prepared by a certified accountant appointed by the Salvor upon completion of all sales transactions. The appointment of the accountants must also be approved by a certified accountant appointed by the Government.

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<sup>81</sup> See paragraph iv. Below.

<sup>82</sup> See para (e) (iii) (b) above.



iv. Profit Sharing

- a. The gross revenue from the sales transactions will be divided between the Salvor and the Government according to the following formula:

|                    |   |            |                  |
|--------------------|---|------------|------------------|
| Up to RM25 mil     | = | 70% salvor | : 30% Government |
| RM25 – RM50 mil    | = | 60% Salvor | : 40% Government |
| More than RM50 mil | = | 50% Salvor | : 50% Government |

- b. Generally, costs borne by the salvor is estimated within the range of 15% - 25% of the FAV amount. Other costs including the taking, storage, restoration of artefacts, insurance, transportation, auctioneer's services and others are subject to negotiation. The total estimated costs to be borne by the salvor from the start of salvage work until the stage of preparation of final report and account is less than 25% of the FAV amount.
- c. Based on the estimated costs above, the estimated net profit for the Salvor is between 40% for a contract value exceeding \$25 million and 20% for a contract value exceeding \$50 million.
- d. For the purpose of defining gross revenue, FAV for all objects and artefacts taken by the Government will be considered as items remaining unsold except for broken pieces which will be distributed (not in cash value).

#### 3.5.4 Salvage Projects Approved by the National Committee on the Protection of Historic Wreck

Salvage activities for the purpose of recovering items from historic shipwrecks have been very few for lack of funding, technology and qualified underwater archaeologists

to supervise salvage and excavation works.<sup>83</sup> According to the Director-General of the Department of Museum and Antiquity, the Department only received ten applications for the purpose of surveying and salvaging historic wrecks during the time when management of historic wrecks were under its direct responsibility. Out of these applications, only four were approved, and only one company did actually go ahead with the project i.e. the *Diana* wreck, which ended up in arbitration.<sup>84</sup> Government policy also requires that the applicants must be locally registered company. Among the more well known historic shipwrecks that were surveyed (but not necessarily salvaged) are as follows:

a) the *Royal Nanhai* (1460) <sup>85</sup>

This wreck is a typical Chinese vessel and it was discovered some 40 nautical miles off the coast of the State of Pahang in West Malaysia. This wreck was excavated in 1995 and was found laden with 15<sup>th</sup> century antique celadon wares.<sup>86</sup> A full report of the description and its archaeological excavation is yet to be published. More than 2,600 of the objects recovered are now in the custody of the National Museum in Kuala Lumpur.

b) *Nassau* (1606)

This wreck was a Dutch vessel, which sank after a fierce battle with the Portuguese in 1606 in an effort to control Malacca. The vessel was discovered in 1993, some 8 nautical miles off Port Dickson, near Cape Richardo, West Malaysia. The project is financed by the Government, while the survey operation itself is conducted by a joint venture of Department of Museum and Antiquity, National University of Malaysia and MARE of the Oxford

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<sup>83</sup> In 2004, the Department of Museum sent one officer for official training as underwater archaeologist.

<sup>84</sup> Arbitrated at the Kuala Lumpur Regional Arbitration Centre in 1999.

<sup>85</sup> See: <http://www.mingwrecks.com/RoyalNanhai.html>.

<sup>86</sup> Among them 21,000 ceramics comprising of Chinese blue and white (Jintai/Tienshun) and Sisatchanalai celadon as well as red and black lacquer box with cover, an ivory sword handle and a bronze elephant shape seal. Source: the Department of Museum and Antiquity.

University.<sup>87</sup> According to Adi Taha, some of the artefacts recovered were 'weaponry such as muskets, bronze cannons, shipping equipment, Spanish silver coins and Bellarmine drinking jug'.<sup>88</sup>

c) *Nanyang* (1380)

This wreck was discovered some 10 nautical miles from the nearest Malaysian island. It has so far only been partially surveyed and excavated.<sup>89</sup>

d) *Risdam* (1727)

Discovery of the Dutch East India Company vessel near the coast of Johor was made in early 1980s. The initial discovery was not reported but the subsequent looting was brought to the attention of the Department of Museum and Antiquity in Singapore,<sup>90</sup> and stolen artefacts were recovered and returned to the Government of Malaysia.

e) *Diana* (1817)

This is probably the most controversial historic wreck excavated within Malaysian waters. It was an English vessel, which sank on 4<sup>th</sup> March 1817 and was discovered in 1994 by the Malaysian Historical Salvors following a contract to salvage with the government of Malaysia off the coast of West Malaysia. Controversy surrounded this wreck when most of its artefacts were auctioned off at Christie's.

f) *Desaru* <sup>91</sup>(1840s)

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<sup>87</sup> Adi Taha, *Underwater Archaeology – Malaysia Experience*, Presentation at Hong Kong, 2003.

<sup>88</sup> Ibid.

<sup>89</sup> There is no full archaeological report on this wreck yet at the time of writing this thesis but some initial information on the wreck can be found at <http://www.maritimeasia.ws/exhib01/pages/p013.html>.

<sup>90</sup> Green, Jeremy, Rosemary Harper, 'The Survey of VOC Fluit *Risdam* (1727) Malaysia', the INT'L J. OF NAUTICAL ARCHAEOLOGY, Vol. 15 (2), 1986, p. 93-104.

<sup>91</sup> See: *The Desaru shipwreck excavation: final report* by Sten Sjostrand, submitted to the Malaysian Department of Museums and Antiquities in January 2003.

This is a Chinese vessel laden with cargos mainly consisting of china ceramics. The name of the wreck is taken after the nearest location it was discovered in the State of *Johor* called *Desaru*. The actual name of the vessel is not known.

There are also some other wrecks which are less commercially attractive but are historically and culturally significant. Examples of these are:

- (a) The *Pontian* boat, *Turiang* and *Longquan*. The *Pontian* was named after the place it was found, Pontian, Pahang, dated 3<sup>rd</sup> – 5<sup>th</sup> century 'on the basis of radiocarbon date and stylistic ceramic found at Oc-Eo in south Vietnam' and it's also 'a lashed-lug and stitched plank vessel, typical of Southeast traditions.'<sup>92</sup>
- (b) The *Turiang* (1370), discovered in 1998 at about 100 nautical miles off to South China Sea at a depth of over 42 meters, is a 'Chinese vessel made of soft wood constructed with large iron nails' containing some 'mixed cargo of Chinese, Vietnamese and Thai pottery'.<sup>93</sup>
- (c) The *Singtai* (1533) is also typical Southeast Asian vessel, its construction including 'bulkheads joined by wooden dowels', excavated in 2001 12 nautical miles off Pulau Redang with cargos mainly consisting of 'Thai storage jars and Sisatchanai covered box'.<sup>94</sup> Obviously, these wrecks are not commercially alluring to the treasure hunters but they are nevertheless historically and culturally invaluable as they represent and contain significant information of trade era of a particular era.

In addition, not all survey services engaged by the Department of Museum will proceed further into a full-scale salvage operation. Hence the two types of contractual agreements in relation to salvage of historic wrecks as practised by the Malaysian

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<sup>92</sup> Adi Taha, above, note 87, slide no. 10.

<sup>93</sup> Ibid, slide no. 11.

<sup>94</sup> Ibid, slide no. 14.

government i.e. contract for conducting surveying and another one for the recovery operation if it is a viable project for recovery purposes. One of the more recent example is the case of the *Tanjung Simpang* wreck which was discovered near the State of Sabah. In this case, the Department of Sabah Museum granted a search and an inspection permit in March 2003 to Nanhai Marine Archaeology Sdn. Bhd., led by Sten Sjostrand. The objective of the inspection permit was 'to locate the source of illegally-salvaged Song dynasty ceramics on sale in antique shops.'<sup>95</sup> The terms of agreement under the permit, was to allow the company 'to investigate any historical site within a specified area and thereafter decide whether or not to commence full-scale archaeological excavation. If this option were declined by the company, it would revert to the Department of Sabah Museum.'<sup>96</sup> Indeed, the company declined the option to excavate and instead preferring to look for other undamaged sites. Interestingly, the Salvage company recommended 'that the wreck be gazetted as a marine archaeological site' as an excavation training ground for Malaysian underwater archaeologists.<sup>97</sup> This follows the success of similar training on the *Desaru* site. Training of underwater and marine archaeologists is certainly a core activity for the advancement of underwater archaeology in Malaysia today considering the dearth of experts in marine and underwater archaeology in Malaysia.

### **3.6 The Special Committee Guidelines on the Management of Historic Wrecks in the light of the 2001 UNESCO Convention**

At the time of the writing of this thesis, information was not made available on whether the special guidelines would continue to be applied by the Heritage Commissioner in considering all projects involving the recovery of underwater cultural heritage.<sup>98</sup> However, pending the publication of further sub-regulations on underwater cultural

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<sup>95</sup> <http://www.maritimeasia.ws/tsimpang/index.html>.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> As mentioned above, the Guidelines was published prior to the National Heritage Act 2005.

heritage,<sup>99</sup> the Guidelines is a worrying evidence of Malaysia's practice in managing underwater cultural heritage within its sovereignty and jurisdiction.

First and foremost, the Guidelines is not a comprehensive set of regulations designed to protect underwater cultural heritage as it merely provides for the procedures for survey works and salvage of shipwrecks which also includes the steps taken in the disposal of artefacts and other related objects. For example, although the Guidelines makes some reference for the conservation work of artefacts and its documentation, no provision is made at all on the protection of underwater cultural heritage *in situ* whether in whole or in part. This is obviously contrary to one of the basic tenets of the 2001 Convention that, underwater cultural heritage shall be preserved *in situ* as the first option.<sup>100</sup> However, obviously, the Guidelines was drafted prior to the National Heritage Act 2005 and the established procedures will have to be reviewed in light of the recent statutory development. The law as it stands now provides that the Heritage Commissioner *may* preserve the underwater cultural heritage *in situ*.

In addition, one of the Guidelines' terms of reference is the application of 'no find no pay principle' which eerily imports the ruthless application of salvage law into government approved projects recovering underwater cultural heritage. This implies a greater emphasis on the importance of any underwater cultural heritage as a commercial property rather than its value in archaeology, history and culture. Although the 2001 Convention does not completely bar the application of salvage law, in reality this can be very difficult to be implemented as the Convention requires on the part of the States approving such projects to respect the objectives and principles of the

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<sup>99</sup> Cross refer to other Chapter, explaining the need for more specific regulations, regulating activities directed at underwater cultural heritage.

<sup>100</sup> Chapter 2, pp. 93-96.

Convention and particularly the Annex Rules of the Convention.<sup>101</sup> Clearly, one of the objectives is the prohibition of commercial exploitation of such heritage. Furthermore, the rules in the special guidelines relating to conservation of artefacts lack the degree of precision and standard offered under the Annex Rules of the 2001 Convention, which has been recognised by the international community as the current minimum benchmark for underwater maritime archaeology.

### 3.7 Conclusion

From the above observations, it is clear that the establishment of the National Committee on the Management of Historic Wrecks is a significant step in the development of marine underwater archaeology in Malaysia. However, it is not without some weaknesses. The requirement for its 'unanimous decision' in the past has caused unnecessary delays in approving a certain project. According to the Department of Museum and Antiquity,<sup>102</sup> this requirement has proven to be problematic since it could hamper urgently required surveys and salvage, while in the meantime, looters have already begun illegal activities on the shipwreck sites.<sup>103</sup> In addition, the relevant government department such as the Department of Museum, is not specifically empowered to submit application to conduct survey and salvage works, thus technically leaving the government in a limbo in terms of conserving wrecks of historical significance but less commercially lucrative.

The Commissioner of Heritage has taken over the duties of the Director-General of the Department of Museum on matters relating to the management of the underwater cultural heritage in Malaysia pursuant to the National Heritage Act 2005. The Act also established the Heritage Council, which advises the Commissioner and the Minister on heritage issues. However, it is understood that the National Committee for the

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<sup>101</sup> Chapter 2, pp. 91-104.

<sup>102</sup> Interview with Tuan Haji Khairuddin, Senior Curator and Enforcement Officer.

<sup>103</sup> Absence of a particular member of the Committee in a meeting is sufficient to cause this problem.

Management of Historic Wrecks still exists although its existence is not properly established under the new Act. It is also understood that the government is looking into this matter as well as into the actual magnitude of the powers and duties of the Heritage Commissioner, which appears to be too wide. In addition, a more pressing issue that needs to be addressed is the application of the Special Guidelines over projects targeting at the underwater cultural heritage, since, as will be shown in subsequent chapters, further sub-regulations or a more detailed guidelines which reflect the minimum standard of underwater archaeology matching those set in the Annex Rules of the 2001 Convention, has yet to be published in order to govern survey or recovery activities.



### Legislative Measures (Part 1): Heritage Legislation

#### 4.1 Introduction

In view of the possible ratification of the UNESCO Convention 2001 by the government of Malaysia, this chapter and the subsequent chapter look at the steps taken by the Malaysian government in providing measures to protect underwater cultural heritage at the national level. Thus, the present chapter and following chapter will examine the legal measures under the current framework of laws governing the protection of underwater cultural heritage and will deal with the challenges faced by the Government in managing underwater cultural heritage in terms of conservation, preservation and economic exploitation. Together, these chapters will elucidate the framework of legal protection affecting underwater cultural heritage within the domestic context and will also respond to some of the principal issues expounded in Chapter 1 and 2; i.e., those of the multiple and competing interests over underwater cultural heritage.

##### 4.1.1 Historical Background

One of the historical events that moulded the Malaysian legal system as we know it today was presence of certain colonial powers in the Southeast Asia region.<sup>1</sup> Malacca, being a major and strategic trading port in the region, was invaded by the Portuguese in 1511 and a century later by Dutch imperialists and then the British. The first two maritime powers did not, however, leave any imprints that have considerable impact

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<sup>1</sup> For historical analysis of the English expansion of maritime power in Southeast and East Asia, see; R. P. Anand, *Origin and Development of the Law of the Sea: History of International Law Revisited*, Martinus Nijhoff Publishers, The Hague, 1983, pp. 115-116.

on the legal system that is applied in Malaysia today, certainly not in comparison to the British colonialist. Malaysia attained independence from the Great Britain on 30<sup>th</sup> August 1957 and became *Malaya*.<sup>2</sup> Today, Malaysia is a Federation consisting of 13 states<sup>3</sup> and 3 Federal Territories.<sup>4</sup> Being an ex-colony of the Great Britain,<sup>5</sup> Malaysia adopts much of the common laws that are applied in England. In addition, much of the areas of the law relating to wrecks and salvage, as well as other laws on cultural heritage such as the common law principles on treasure troves, are also of English origin. The Merchant Shipping Ordinance 1952 for instance, which deals with wrecks and salvage, follows closely the United Kingdom's Merchant Shipping Act 1894.<sup>6</sup>

#### 4.1.2 Ancient laws of Malacca

Prior to British governance of the Malay States,<sup>7</sup> there was already in existence some form of laws on the governance of Malacca,<sup>8</sup> both as a trading port and as part of the Malay Sultanate Kingdom. The role played by Malacca as an ancient world trading port was significant and illustrious, and described by Tom Pires as:

There is no doubt that the affairs of Malacca are of great importance and of much profit and great honour. It is a land that cannot depreciate, on account of its position, but must always grow. No trading port as large as Malacca is known, nor any where they deal in such fine and highly-prized merchandise. Goods from all over the East are found here; goods from all over the West are sold here. It is at the end of the monsoons,

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<sup>2</sup> Singapore severed itself from the post-independence *Malaya* in 1963 as a result of political constraints.

<sup>3</sup> Selangor, Negeri Sembilan, Malacca, Kedah, Kelantan, Terengganu, Pulau Pinang,, Perlis, Perak, Pahang, Johor, Wilayah Persekutuan, Sabah and Sarawak.

<sup>4</sup> Federal Territory of Kuala Lumpur, Labuan and Putrajaya.

<sup>5</sup> Although one could argue that Malaysia as a single entity was never a colony since the country was then divided into Federated and Un-Federated Malay States.

<sup>6</sup> This Act has since been replaced by the Merchant Shipping Act 1995. However, the legal provisions on wrecks and salvage in the 1894 Act are mostly retained under the 1995 Act.

<sup>7</sup> During British colonisation, Malaysia was then divided into the Federated and Un-Federated Malay States.

<sup>8</sup> Now, Melaka is one of the States in the Federation of Malaysia.

where you find what you want and sometimes more than you are looking for.<sup>9</sup>

With the development of Malacca as a strategic trading point between East and West, there then grew the need for the promulgation of certain laws in order to achieve order in the way locals and foreign merchants conducted their business. The application of the rules pertaining to shipping and trade activities can be traced at least as far back as the reign of Sultan Muhammed Shah of Malacca in 1276<sup>10</sup> or earlier. These activities were regulated through the *Hukum Kanun Melaka* (Malacca Penal Code) and the *Undang-undang Laut Melaka* (Malacca Maritime Laws). It was during the reign of Sultan Muhammad Shah that these laws appeared to have been compiled.<sup>11</sup> Five out of the forty four provisions in the Malacca Penal Code are on matters pertaining to the ocean<sup>12</sup> while the Malacca Maritime Laws contained more elaborate regulations. In principle, the Malacca Maritime Laws provide for rules and regulations on trade, sales of goods, and other rules on the powers of ship captains and Harbour Master. The objectives of these laws were stated in the Preamble as:

In order to achieve order and safety in matters pertaining to shipping, in order that there shall be no conflicts and disorder affecting conventions and practices in shipping, in order that there shall be safe employment at sea... in order that there shall be no quarrels at sea and there shall be no wrong doings in words and in actions against one another and so that there shall be no blood spilled<sup>13</sup>

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<sup>9</sup> Armando Cortesao (ed.), *the Suma Oriental of Tome Pires*, Vol. II, Hakluyt Society, London, 1944, p. 286. See also; R.P. Anand, above, note 1, pp. 28-31.

<sup>10</sup> Raffles, Sir Stamford, *On the Melayu Nation: the Maritime Institutions of the Malays* (translated from the Melayu Language) (1820), p. 130.

<sup>11</sup> The texts of these laws are available in Liaw Yock Fang, (ed.), *Undang-undang Melaka* (The Laws of Melaka), Bibliotheca Indonesia, 13, the Hague, 1976.

<sup>12</sup> Article 9(2), 11(3), 23 (3), 23(4) and 23(5) of the Malacca Code.

<sup>13</sup> Translated from Malay, the Preamble, *Undang-undang Laut Melaka*.

One example of such legal provisions on maritime affairs can be found in matters pertaining to safety on vessels whilst at sea, which were to be enforced on 'ships, Junks as well as *Prahus*.'<sup>14</sup> Here, among other things, the Malacca Maritime Laws provide that:

when there is a violent storm [and when] it may be necessary to throw overboard a part of the cargo for the safety of the vessel, a general consultation shall be held with respect to the property in the vessel, and those who have much and those who have little, must agree to throw overboard in proportion.<sup>15</sup>

The only legal provisions that are of considerable weight are those relating to the finding of treasure trove by a member of ship's crew or the Captain. The provisions are reproduced below:

These are the laws respecting anything that may be found, whatever it may be, whether gold, silver, run-away slaves, or otherwise:

Whatever is found on the sea, whoever may discover it, is the property of the *Nakhodah*<sup>16</sup> of the *Prahu*<sup>17</sup>, who may give what he thinks proper to the persons who found it,

Whatever may be found by persons sent on shore to procure wood or water, in like manner becomes the property of the *Nakhodah*, because such persons act under his authority and are performing the duty of the *Prahu*,

The Trove is to be divided into four parts, one of which (only) shall belong to the *Nakhodah*, because there may be many of the finders, But whatever may be found on shore by persons belonging to the *Prahu*, at the time when they are not acting under the *Nakhodah's* orders, nor performing the duty of the *Prahu*, even if the parties are *Kiwis* or *Turun Menug'en*, the trove shall be divided into three parts, and one third shall appertain to the finder, and the remaining two parts become the property of the *Nakhodah*,

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<sup>14</sup> Small boat peculiar to Malay practices at sea.

<sup>15</sup> Article 11 of *Undang-undang Laut Melaka*.

<sup>16</sup> Malay for Ship Captain.

<sup>17</sup> Malay for Vessel.

If a trove is found under such circumstances by the Nakhodah's debtors, in that case, one half of the trove shall belong to the debtors and the other to the Nakhodah.<sup>18</sup>

The phrase 'whatever found on the sea' conveys wide coverage but is ambiguous as it could relate to treasures or anything found on another ship sailing on the sea just as much as treasures or anything found on the seabed. The Code is also silent on other important issues relating to State ownership over discovered treasures. More importantly, there is no further proof that these laws were regarded as binding laws beyond the jurisdiction of Malacca Kingdom. There is no evidence of its application in practice apart from scholarly writings on Malacca's maritime and trading history. According to Tom Pires, 'through this custom the land lived in an orderly way and they carried on their business. And that was done thus orderly, so that they did not favour the merchant from the ship, nor did he go away displeased; for the laws and the prices of merchandise in Malacca are all known.'<sup>19</sup> Other than this, very little can be said on the effectiveness of these ancient maritime laws and certainly nothing can be related to the modern laws governing salvage activities today. The relevant legal provisions on for on-board cargo also appears to be very limited in scope, enacted in order to simply create 'order' and 'safety' over activities at sea and in the harbour. To compare the simplicity of these laws to the sophistication of modern salvage and treasure trove laws bears no fruitful result. At best, these laws are a fair evidence of Malacca's role as an important trading point connecting Europe and the Far East.

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<sup>18</sup> *Undang-undang Laut Melaka*, above, note. 11.

<sup>19</sup> Armando Cortesao (ed.), *the Suma Oriental of Tome Pires*, above, p. 274. C.f. for instance the criticism posed by Meilink Roelofs on the corruption that was prevalent under the very same system at that time nevertheless came to a surprisingly forgiving conclusion: '[the] bureaucracy seems to have worked efficiently and led to quite a considerable degree of legal security. The foreign merchants felt safe [but] Malaccan trade was so lucrative that the merchants could well afford the extra costs with which they were confronted in the way of bribes, extra levies, gifts and other forms of corruption. These abuses were certainly no worse in Malacca than in other ports and therefore were not in themselves a reason for the merchants to avoid Malacca.'

#### 4.1.3 Pre-Malaya Legislation

Prior to the formation of Malaya, there were no unified laws governing the discovery of treasure troves and archaeological antiquities throughout the Malay States as it was still divided into the Federated and the un-Federated Malay States under British governance. In fact, before the Second World War, there was no law in the Federated Malay States or the Straits Settlement on treasure trove or the findings of antiquities. The State of Perak (a constituency of the then Federated Malay States) was the first to enact a law on treasures through the Order-in-Council No. 15 On the Discovery of Treasures, Curiosities etc. (1888), which was later repealed by the Enactment 'To Repeal Certain Laws' No. 2 (1934). Kedah and Johore (both were of the then Un-Federated Malay States) had also enacted laws dealing with treasure troves. Johore Treasure Trove Enactment 1936, for instance, defined treasure trove as 'anything of any value or of any public interest (whether such interest or value be monetary, historic, traditional, artistic, architectural, archaeological or otherwise) found in the soil or in anything affixed thereto.'

Intrinsic in these laws was the mechanism for ascertaining ownership of discovered treasure troves in the event of the absence of the owner or the person who had hidden the treasures claiming or establishing his or her property. The law also provided for the regulation of ascertaining the rights of any other claimants to the treasures. Similar to the legal position today, if such treasures should become ownerless, the ownership of the treasures shall vest with the State authority (then the Sultan of the State). The provisions of the Kedah Treasure Trove Enactment 1938 *on treasure trove* are similar to the Kedah Land Law position on treasure trove which provided that 'All treasure trove is the property of the Sultan and any person finding it shall with all reasonable

despatch deliver the same to the District Officer or Treasurer.<sup>20</sup> Here, the finders' rights are only in respect of entitlement of reward and not to the treasures found. Looking at the wording of these laws they were obviously meant to cover only treasure trove found on land and were very much in essence the English Common law position that such treasures are to be regarded as the absolute property of the sovereign.<sup>21</sup> Matters concerning antiquities were however left simply uncovered.

#### 4.1.4 Post-Independence Legislation

The late Tunku Abdul Rahman, Malaysia's Father of Independence, in his speech before the Antiquities and Treasure Trove Bill was read on 12<sup>th</sup> July 1956 aptly announced that;

It is the duty of all civilised states to take proper measures to safeguard the heritage of the past but at the present moment there is no legislation in force in the Federation to control archaeological antiquities nor, except in the States of Johore and Kedah, there is no legislation dealing with treasure trove. The Bill now before you seeks to [give effect to] such control and to make suitable arrangement for treasure trove throughout the Federation.<sup>22</sup>

Indeed, when parts of Malaysia were still the then Federated Malay States under the Great Britain, there was no specific legislation for the purpose of protecting antiquities or for matters relating to archaeological finds and the findings of treasure troves. Therefore, at that time, should any matter crop up regarding the ownership of such findings, the laws to be applied are the laws as applied and administered in England. For the purpose of the application of English Common law in the Federated Malay States, the Civil Law Act 1937 was enacted. These laws were amended in 1951 (Civil Law (extension) Ordinance 1951) to cater for its application into the Un-Federated

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<sup>20</sup> See; John Doraisamy, below, note 22.

<sup>21</sup> Blackstone's Commentaries on the Laws of England.

<sup>22</sup> See; Doraisamy, J., 'Treasure Lost and Found: Some Legal Aspects', p. 173, in Mohd Yusoff Hashim (et. al.), *Kapal dan Harta Karam* (Ships and Sunken Treasures), Muzium Negara Malaysia, Kuala Lumpur, 1986.



Malay State as well. Only in 1956 were these laws repealed by the Civil Law Ordinance 1956 Civil Law Act 1957.<sup>23</sup> The Antiquities and Treasure Trove Enactment was then passed in 1957. By this time, the State of Sarawak had already enacted its own laws on antiquities i.e. the Antiquities Ordinance 1952. When Sarawak joined the Federation of Malaysia in September 1963, Sarawak's Antiquities Ordinance 1952 was amended to align with relevant provisions in Federal laws.<sup>24</sup> With that amendment, as far as the State of Sarawak is concerned, the Ordinance of 1952 would now also apply to all antiquities declared to be federal items under the Federal law.<sup>25</sup>

#### **4.2 Current Framework of Laws Relating to Cultural Heritage Protection**

Prior to the National Heritage Act 2005, the protection of cultural heritage including the protection of historic sites and buildings excluding other than natural environmental heritage, hinge on various laws both at the Federal and State levels. Since the scope of protection of cultural heritage covers many issues ranging from tangible and intangible heritage, terrestrial and underwater, locating the sources of laws reveals a myriad of legislation. Listed below are the laws that are the main source of authority when it comes to conservation and preservation of Malaysian heritage in its widest perspective:

- (a) Principal source of law
  - (i) The Federal Constitution<sup>26</sup>
- (b) On cultural heritage in general:
  - (i) National Heritage Act 2005 (Came into force 30 March 2006)  
Antiquities Act 1976 (West Malaysia only) up until march 2006
  - ii) Antiquities Ordinance 1954 (East Malaysia – Sarawak)
  - iii) Antiquities and Treasure Trove Enactment 1977 (East Malaysia – Sabah)

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<sup>23</sup> See further, Ch. 5, para 5.2.3.

<sup>24</sup> Doraisamy, J., above, note 22, p. 173.

<sup>25</sup> Note that the Antiquities Act 1976 is only applicable in the Peninsular Malay excluding the States of Sabah and Sarawak.

<sup>26</sup> Act 000.



- iv) Local Government Act 1976
- v) Town and Country Planning Act 1976
- vi) Kuala Lumpur (Planning) Act 1973
- vii) Land Acquisition Act 1960
- viii) National Land Code 1960
- ix) Treasure Trove Ordinance 1957 (Revised 1995)
- x) Custom Act 1967
- xi) Custom Order (Export Prohibition) 1998
- xii) Johore Treasure Trove No.28, 1956.
- xiii) Preservation & Conservation of Cultural Heritage Enactment 1998 (Malacca)
- xiv) Johor Heritage Foundation Enactment No.7/1998.
- xv) Land Conservation Act 1960.
- (c) On written heritage:
  - i) National Library Act 1972 and the National Library Act (Amendment) 1987 Library Submission Act No.33/1986.
  - ii) National Cultural Policy Document
  - iii) National Archive Act 2003 (Act 629)
- (d) On natural environment (excluding other core Environmental legislations<sup>27</sup>):
  - i) National Park Act 1980
  - ii) National Forestry Act 1984 (Act 313) (Amendment 1993)
  - iii) Wildlife Protection Act 1972 (Act 76)
  - iv) Geological Survey Act 1972 (Act 129)
  - v) Aboriginal Peoples Act 1954 (Act 134)
  - vi) State Mineral Enactments
  - vii) National Quarries Regulations

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<sup>27</sup> For example, the Environmental Quality Act 1974 and legislations controlling pollution from ships.

- viii) National Forestry Policy 1978 (Amendment 1992)
- ix) Mineral Development Act 1994 (Act 525)
- (e) Where it pertains to wrecks, salvage, fisheries and ocean resources
  - i) Exclusive Economic Zone Act 1984 (Act 311)
  - ii) Merchant Shipping Ordinance 1952
  - iii) Fisheries Act 1985 (Act 317)
  - iv) Continental Shelf Act 1966

Prior to the coming into force of the National Heritage Act 2005 on 30 March 2006, the Antiquities Act 1976 and the Treasure Trove Enactment 1957 were the major Acts governing heritage issues. The Antiquities Act 1976 and the Treasure Trove Enactment 1957 were, however, only applicable in West Malaysia. In East Malaysia, the State of Sabah and Sarawak have their own legislation on antiquities and cultural heritage. For Sabah, there is the Antiquities and Treasure Trove Enactment 1977 and the Cultural Heritage (Conservation) Enactment 1997, while in Sarawak, the laws are the Antiquities Ordinance 1954 and the Sarawak Heritage Ordinance 1993.<sup>28</sup> These laws are still in force.

#### **4.2.1 The Absence of Specific Legislation Protecting the Underwater Cultural Heritage prior to National Heritage Act 2005**

For many years prior to the enactment of the National Heritage Act 2005, unlike in other comparable common law jurisdictions such as the United Kingdom and Australia, there was no specific legislation protecting wrecks of cultural and historical

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<sup>28</sup> It is not the objective of this chapter (and the following chapter) to go through each of these legislation because they pertain to the protection and preservation of historical environments, protection cultural and natural heritage in the wider perspective. Instead, this chapter aims to identify the existing legal provisions within these select legal corpora which are of relevance to underwater cultural heritage protection. Consequently, only the legislation listed in paragraph (a), (b) and (e) will be discussed. This Chapter will specifically address core issues in items (a) and (b) only.

significance. Although the realisation of the need to protect the underwater cultural heritage is relatively recent, it did not emerge overnight. The Department of Museums and Antiquities in Kuala Lumpur had been facing difficulties in managing historical wrecks as far back as the 1980s, and this situation led to the establishment of the National Committee on the Management of Historical Wrecks in 1986.<sup>29</sup> Yet, nearly 20 years after the establishment of the Committee, there was no specific legislation catering for this need. The absence of such laws on historical wrecks was because the general antiquities legislation (the Antiquities Act 1976) was regarded as sufficient in dealing with the underwater cultural heritage.<sup>30</sup> At least this was the view held by some government officials back in the 1980s.<sup>31</sup> There was little understanding on the need to protect this heritage and issues relating to underwater cultural heritage were a very low priority for the government. Government policy papers from 1980s to the late 1990s shows nothing regarding the need to protect underwater cultural heritage as part of the regime protecting the historic environment.<sup>32</sup> Even the management of underwater cultural heritage was misplaced for quite some time; the National Committee on the Management of Historic Wrecks was only transferred from the Ministry of Finance to the then Ministry of Culture, Arts and Tourism in 1997.

Although archaeological research has been conducted in Malaysia for more than a century ago, such activities have always concentrated on land-based discoveries.<sup>33</sup> Early efforts by the Department of Museums and Antiquities in enhancing the work and standards of maritime archaeology in Malaysia began in the early 1980s. In 1982, a proposal by the Department of Museums and Antiquities for the establishment of a

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<sup>29</sup> See: Ch. 3, para 3.5, pp. 125-127, on Commercial Salvage and the National Committee on Historical Wrecks.

<sup>30</sup> See further, para 4.3.2 below.

<sup>31</sup> Adi Haji Taha, above, p. 139, held the view that the definition of 'antiquity' under sec. 2 of the Antiquities Act 1976 was enough to cover historic wrecks.

<sup>32</sup> Rancangan Malaysia (Malaysia Plan) 1980 – 1990.

<sup>33</sup> Adi Haji Taha, above, p. 133.

maritime archaeology museum was approved by the Public Service Department. Unfortunately, despite the approval, the idea was shelved indefinitely.<sup>34</sup> Financial constraints in government funding of underwater archaeology projects and the lack of staff and expertise were cited as the main reasons.<sup>35</sup>

The main objectives of archaeological research and activities are not only the gathering of much coveted artefacts but also to study the processes that create an archaeological site. In order to fulfil these objectives, the Department desperately needs archaeologists who are well trained in underwater archaeology and a large sum of money to be invested in archaeological equipments and project management.<sup>36</sup> Within this constraint, and at the same time realising the importance of maritime archaeology as well as the problems that pose threats to this heritage, a National Committee on the Management of Historic Shipwrecks was established in 1988 to consider and make decisions on matters pertaining to the survey and salvage of historic wrecks.<sup>37</sup> The Committee also works closely with Department of Museums and Antiquities in governing survey or salvage activities directed at underwater cultural heritage.<sup>38</sup>

In Malaysia, the protection of historical environments has in the past been concentrated on the preservation and conservation of buildings, monuments and land-based sites. The first attempt by the government to consider the adequacy of relevant laws in governing art thievery and illegal syndicates in antiquities was made in 1956. The task

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<sup>34</sup> Adi Haji Taha, *Masalah dan Persoalan Semasa Mengenai Arkeologi di Semenanjung Malaysia*, p. 136, in Jawatankuasa Penerbitan Jabatan Sejarah Universiti Malaya, *Kapal dan Harta Karam Malaysia (Ships and Sunken Treasure)*, Persatuan Muzium Malaysia, 1986.

<sup>35</sup> Adi Haji Taha, *Cultural Heritage and the Role of the Department of Museums and Antiquity*, p. 3.

<sup>36</sup> Ibid, p. 137.

<sup>37</sup> See Chapter 3, para 3.5.

<sup>38</sup> Such arrangement applies to all maritime zones over which the Malaysian government asserts control and jurisdiction which includes those wrecks found beyond Malaysia's territorial waters. See chapter 3, pp. 134-137 on the various locations where wrecks have been found.

was given to the Select Committee of the Legislative Council under the Chairmanship of Dato' Abdul Razak, the then Minister of Education (later Prime Minister) who was at that time given the mandate to study the Antiquities and Treasure Trove Bill (1956).<sup>39</sup> The Committee came to the conclusion that 'dealings in antiquities are not carried out in Malaysia on any considerable scale and there seemed to be no particular reason why an attempt to cheat should not be left to the provision of the ordinary criminal law.'<sup>40</sup> Today, such remark is no longer justifiable. The study was conducted more than 50 years ago and was carried out at a time when Malaysia was on the verge of achieving independence from Great Britain. However, times have changed, and the same rationale is no longer appropriate in the light of contemporary developments in the art and antiquities market. Malaysia is not only recognised as a source-rich country where there are thousands of wrecks waiting to be discovered lying around its coasts, but it is also a significant transit point for the movement of cultural properties within the Southeast Asia region.

Since independence, three major statutory developments have occurred.<sup>41</sup> The first is the enactment of the Antiquities and Treasure Trove Enactment 1957, which had been repealed by the Antiquities Act 1976. The latter was recently repealed by the National Heritage Act 2005. The law that stood under the Antiquities Act 1976 was the revised version of the Antiquities and Treasure Trove Enactment 1957, which was passed by the Legislative Council in the same year the country attained independence. The Antiquities and Treasure Trove Enactment of 1957 was repealed by the Antiquities Act 1976, except in so far as it pertains to matters on treasure troves.<sup>42</sup> The Antiquities Act

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<sup>39</sup> The Committee members consist of the Chairman, the Attorney General, Mr. F.G. Pooley, Dr. Lim Chong Eu, Tuan Haji Mior Ariff bin Mior Alwi, Encik Abdul Gaffar bin Baba, Mr. K.L. Devaser and the Menteri Besar of Johor.

<sup>40</sup> Special Committee report on The Antiquities and Treasure Trove Bill 1956.

<sup>41</sup> Including the National Heritage Act 2005, which will be considered at para 4.2.2 below.

<sup>42</sup> Treasure Trove Enactment 1957 was repealed by the Antiquities Act 1976 (Am. L.N. 332/58: Act 168).

1976 departed from the 1957 Enactment in that it conferred ownership of all 'antiquities' found in the Peninsular of Malaysia to the Federal government. However, those antiquities found in the states of Sabah and Sarawak would still remain in State ownership and jurisdiction and they are governed by the Antiquities and Treasure Trove Enactment 1977 and the Antiquities Ordinance 1954 respectively. These laws were enacted to control, to preserve, as well as to provide for research and regulations into activities affecting ancient and historical monuments, archaeological sites and remains, antiquity and historical objects. They also provided control of the movement of these objects out of Malaysia. However, quite notably, underwater cultural heritage was nowhere defined in the Antiquities Act 1976, although the term 'antiquities' itself had been liberally applied to cover all objects whether terrestrial or underwater. In addition, none of the other States' legislation pertaining to the protection of cultural heritage provides any specific mechanism on the protection of underwater cultural heritage.

#### **4.2.2 The Birth of the National Heritage Act 2005**

The year 2006 was a milestone for Malaysia for two reasons. Firstly, and most significantly, it saw the coming into force of the National Heritage Act 2005 on 30<sup>th</sup> March 2006, and secondly, the Ninth Malaysia Plan (2006 – 2010),<sup>43</sup> as announced by Prime Minister Dato' Seri Abdullah Badawi, reinforces a previous national commitment in the Eighth Malaysia Plan for the protection and preservation of cultural heritage. In addition, in terms of the distribution of powers between the Federal and State governments, the Federal Constitution was amended in 2004 to confer the Federal Government with concurrent legislative power on matters pertaining to cultural heritage. Prior to that amendment, cultural heritage was neither in the Federal nor in State List.

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<sup>43</sup> The document is available at the Economic Planning Unit website at: <http://www.epu.jpm.my/rm9/html/english.htm>.

The drafting of the new Act also derived from the invaluable contribution of the Cultural properties Bill 2000, developed under the chairmanship of the late Tan Sri Harun Hashim. The Bill, as Malaysia was celebrating the new millennium, was being touted as an amendment to the Antiquities Act 1976.<sup>44</sup> The Bill contained some provisions on the protection of 'historical wrecks'. The drafting of the new laws on the protection of underwater cultural heritage was given consideration during the years that Government took part in the negotiation of the Draft UNESCO Convention on the Protection of Underwater Cultural Heritage. In the year 2000, the Director General of the Museums and Antiquities Department announced that in so far as they pertain to the management of underwater cultural heritage, the drafting of these laws would, among others, outline the:

Definition of shipwrecks in seas, lakes and rivers, clarify their historical significance pertaining to the ownership, encourage surveys and detail salvage procedures. It will pave the way for the establishment of an underwater archaeology division in the department to advance efforts to explore and preserve the country's underwater heritage. Eventually, it aims to set up a national maritime museum to display salvaged artefacts.<sup>45</sup>

The Cultural Properties Bills was scheduled for its first reading in November 2003 in the Parliament but this did not go any further as the newly reshuffled Ministry of Arts, Culture and Heritage decided to replace it with another proposed stand alone National Heritage Act.<sup>46</sup> Although the Bill was never enacted due to the structuring of

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<sup>44</sup> Chiew, H., 'Sunken resource protection: legislation to better govern salvage of submerged wrecks and their contents', The STAR, 6 March 2000.

<sup>45</sup> Ibid.

<sup>46</sup> Information by the Ministry of Culture, Arts and Heritage, Kuala Lumpur. Within the five years, the names of the proposed new law has changed from 'cultural properties bill' to 'heritage preservation bill' to 'national heritage bill'.

government Ministries,<sup>47</sup> it became a foundation for the drafting of the National Heritage Act 2005. The changes that occurred since the drafting of the Bill (in its treatment of underwater cultural heritage) are both remarkable and significant. The first obvious and distinct change is the shift from the notion of 'properties' to the notion of 'heritage'. Secondly, and more importantly, the terms 'historic wrecks' were replaced with 'underwater cultural heritage'. The notion of the protection of underwater cultural heritage prior to the National Heritage Act 2005 was very much influenced by 'historic wrecks' legislation in countries such as the United Kingdom and Australia, as is obvious from the drafters' use of a term like 'historic shipwrecks' in denoting what underwater cultural heritage is. The change was not accidental, and this must be attributed to the years of deliberations at UNESCO, which had undoubtedly influenced the statutory development in Malaysia.

### **4.3 Definitions**

#### **4.3.1 Cultural Heritage**

The repealed Antiquities Act 1976 offered no definition for the term 'cultural heritage' but the term is defined under the four State legislation pertaining to cultural heritage protection and conservation i.e. Malacca, Johor, Sabah and Sarawak state legislation.<sup>48</sup> However, the definition of 'cultural heritage' as employed under these State laws is not comprehensive. The Malacca Enactment of the Preservation and Conservation of Cultural Heritage 1988, for instance, defines cultural heritage as:

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<sup>47</sup> Parliament was dissolved in 2004 prior to its tabling. The then Ministry of Culture, Arts and Tourism was restructured into two Ministries; Ministry of Culture, Arts and Heritage and the Ministry of Tourism. Under the leadership Dato' Sri Rais Yatim, the Cultural Properties Bills 2000 was to be reviewed to incorporate certain changes.

<sup>48</sup> Sabah Cultural Heritage (Conservation) Enactment 1997, Sarawak Heritage Ordinance 1993, Malacca Enactment for the Preservation and Conservation of Cultural Heritage 1988 and Johor Heritage Foundation Enactment 1988.



antiquity, historical object, historical site, site, fabric, building, structure, ethnographic matter, works of art, manuscript, coins, currency notes, medals, badges, scientific crest, flag, armour, vehicle, ship and trees which has a significant and special architectural, aesthetic, historical, cultural, scientific, economic and any other interest or value.<sup>49</sup>

The same goes for the definition adopted under the Sabah Enactment, but the latter has more bearing on underwater cultural heritage in that it purports to cover heritage that may be found 'on land or in the sea'.<sup>50</sup> In addition, it also includes 'environmental' considerations in ascertaining the value of particular heritage. Apart from this slight, but arguably significant distinction, the definition of the term as applied under the various State laws is uniform. A fundamental flaw in these definitions is that they focus on the tangible and built environment, and completely ignoring the protection of the nation's intangible cultural heritage. In this regard, the ASEAN Declaration of Cultural Heritage 2000<sup>51</sup> has been a positive impact in developing a comprehensive legal conception of cultural heritage in Malaysia as seen under the National Heritage Act 2005. Under the new law, cultural heritage means:

tangible and intangible cultural property, structure or artefact and may include a heritage matter, object, item, artefact, formation structure, performance, dance, song, music that is pertinent to the historical or contemporary way of life of the Malaysians, on or in land or underwater cultural heritage of tangible form but excluding natural heritage.<sup>52</sup>

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<sup>49</sup> Section 2(1) of the Malacca Enactment No. 6 of 1988.

<sup>50</sup> Sabah Cultural Heritage (Conservation) Enactment 1997's defines cultural heritage as: 'Any antiquity, historical object, historical site, site, area (*whether on land or in the sea*), fabric, building, structure, ethnographic matter, work of art, manuscript, coin, currency note, medal, badge, insignia, crest, flag, armour, vehicle, ship and tree, which has a significant and special architectural, aesthetic, historical, cultural, scientific, economic, environmental or any other interest or value and has been declared to be subject to preservation or conservation under section 4(1).'

<sup>51</sup> Considered earlier in chapter 1, para 1.3.2. Full text of the Declaration is available at <http://www.aseansec.org/641.htm>. See; chapter 1, at pp. 15-16.

<sup>52</sup> Sec. 2 (1) of the National Heritage Act 2005.

Without doubt, this definition offers wide latitude for the subject matter of protection and it reflects contemporary understanding of the term as employed under various international treaties relating to cultural heritage protection.<sup>53</sup>

#### 4.3.2 Underwater Cultural Heritage

As far as underwater cultural heritage is concerned, the adoption of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage and the subsequent campaigns for its ratification,<sup>54</sup> have also had considerable impact in developing a more comprehensive definition of the term. The National Heritage Act 2005 defines 'underwater cultural heritage' as:

All traces of human existence having a cultural, historical or archaeological character, which have been partially or totally underwater, periodically or continuously, for at least 100 years such as –

- (a) sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context;
- (b) vessels, aircraft, other vehicles or any part thereof, their cargo or other contents, together with their archaeological and natural context; and
- (c) objects of prehistoric character<sup>55</sup>

The Act also specifies that 'pipelines and cables placed on the seabed' and 'installations other than pipelines and cables, placed on the seabed' shall not be considered as underwater cultural heritage.<sup>56</sup> This definition follows closely the one adopted under the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage,

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<sup>53</sup> 2000 ASEAN Declaration on Cultural Heritage, 2003 UNESCO Convention on the Protection of the Intangible Heritage and the 1972 World Cultural and Natural Heritage Convention. Malaysia is not yet a party to the 2003 Convention which has already come into force.

<sup>54</sup> UNESCO Campaign for the Asian region was held in Hong Kong in 2003.

<sup>55</sup> Sec. 2(1) of the National Heritage Act 2005.

<sup>56</sup> Sec. 2(3), Ibid.

although, to date, Malaysia has yet to ratify the Convention. Hesitant attitude in ratifying the Convention is partly due to the strong objection and confusion within government Ministries and departments on the stance taken by the Malaysian delegation during the UNESCO deliberations.<sup>57</sup> Despite this uncertainty on government position, the term 'underwater cultural heritage' under National Heritage Act 2005 was obviously drafted mindful of the 2001 Convention. In fact, as mentioned earlier, the inclusion of a chapter on 'underwater cultural heritage' is one area where National Heritage Act 2005 departs from the repealed Antiquities Act 1976. Drafting a new law on 'historic wrecks' instead of the much wider scope of 'underwater cultural heritage', would have been a development out of step with the motivation behind the 2001 UNESCO Convention, that is, a more comprehensive coverage towards managing underwater cultural heritage.

#### **4.3.3 Other Terms That Have Connection with Underwater Cultural Heritage**

##### **(a) Antiquities**

The term 'antiquity'<sup>58</sup> under the Antiquities Act 1976 was inadequate to cover underwater cultural heritage. However, reference to objects of antiquities which may be found on the seabed, had been interpreted to be sufficient enough by the cultural heritage administrators to cover the underwater cultural heritage. Whether or not the term underwater cultural heritage can be appropriately covered under the term 'antiquity', is much less important than whether the legal provisions under the repealed Antiquities Act 1976 as well as under the various States laws, adequately dealt with issues specifically relating to this type of heritage. The definition of 'antiquity' under

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<sup>57</sup> Considered earlier in chapter 2, para 2.1.1.

<sup>58</sup> The repealed Antiquities Act 1976 as well as the four State legislation pertaining to cultural heritage in Malacca, Johor, Sabah and Sarawak and the Antiquities laws in the States of Sabah and Sarawak, all maintain a uniformed definition of the term 'antiquity'. See for instance Section 2(1) of the Malacca Preservation and Conservation of Cultural Heritage Enactment 1988 and also Article 2(1) of the Sabah Antiquities and Treasure Trove Enactment 1977.

the new law is much simpler than the previous definition under the Antiquities Act 1976.<sup>59</sup> The difference is that the term 'antiquities' under the current legislation covers anything aged 50 years old or more, while under the previous law, the requirement was 100 years.

The definition of 'antiquity' under the Antiquities Act 1976 was considered to sufficiently cover the underwater cultural heritage because the phrase included 'any movable or immovable object', which may be discovered on 'the bed of river, lakes and the sea'.<sup>60</sup> In addition, reference to objects which are 'constructed, shaped, inscribed, erected, excavated' or 'otherwise produced or modified by human agency' are not particularly helpful in reference to underwater cultural heritage simply because underwater cultural heritage on the whole and the associated environment is not a product of intentional human construct.

There seems to be no scientific justification for the requirement for the object to be or 'which is or reasonably believed' to be 100 years old or even 50 years old as antiquity.<sup>61</sup> A lesser age requirement means more objects could possibly meet the criteria set. Experts are of the view it is purely for administrative purpose in order to provide a blanket protection over antiquities.<sup>62</sup> In Sabah, protection was given to antiquities which are 'reasonably believed to be... prior to January 1<sup>st</sup> 1920', and in Sarawak

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<sup>59</sup> The previous Act defined antiquity as '(a) any object moveable or immovable or any part of the soil or of the bed of a river or lake or of the sea, which has been constructed, shaped, inscribed, erected, excavated or otherwise produced or modified by human agency and which is or is reasonably believed to be at least one hundred years old; (b) any part of any such object which has may at later date been added thereto or reconstructed or restored; (c) any human, plant or animal remains which is or is reasonably believed to be at least one hundred years old; and (d) any object of any age which the Director-General by notification in the Gazette declares to be antiquity.'

<sup>60</sup> Art. 2(1) of the Antiquities Act 1976. However, under the Sarawak Antiquities Ordinance 1954, the phrase 'the bed of river, lakes and the sea' does not appear at all.

<sup>61</sup> See chapter 2, para 2.2.2(ii).

<sup>62</sup> See chapter 2 on the 100 years requirement in the definition of the underwater cultural heritage.

'earlier than the year 1850 A.D.' These differing interpretations of minimum age of 'antiquity' suggests that age is of less importance compared to the historical or cultural value or *significance* associated with a particular object of antiquities. In attempting to include underwater cultural heritage under the term 'antiquity', the Antiquities Act 1976 derived strength from the wide power given to the Director-General of the Department of Museums and Antiquities to declare 'any object of any age'<sup>63</sup> to be an object of antiquity. Thus, *any* object could be declared an object of antiquities despite not meeting the age requirement. The setback, of course, is that this decision may be arbitrary as one could find no further guidance under the Act in determining this matter.

#### **(b) Treasure Trove**

Treasure trove can have close connection to underwater cultural heritage if found on a wreck site or any site which had become submerged. Although treasure trove is included on the State list, the National Heritage Act does contain some provisions on treasure trove for the purpose of promoting uniformity of States' laws throughout the Federation.<sup>64</sup> The current definition of treasure trove retains much of the original definition under Article 2(1) of the Treasure Trove Enactment 1957, which defined treasure trove as:

any money, coin, gold, silver, plate, bullion, jewellery, precious stones or any object or article of value found hidden in, or in anything affixed to the soil or the bed of a river or of the sea, the owner of which is unknown or cannot be found, but shall not include any antiquity.

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<sup>63</sup> Section 2(1)(d) Antiquities Act 1976

<sup>64</sup> Art. 76(1) of the Federal Constitution and sec. 73 of the National Heritage Act 2005.

However, the remaining words of 'but shall not include any antiquity' is now replaced by the phrase 'but does not include any tangible heritage'.<sup>65</sup> However, this definition clearly shows that treasure trove is a legal term distinct from 'antiquities' and 'historical objects' as defined under the National Heritage Act 2005<sup>66</sup> although it may have bearing on the underwater cultural heritage.

### (c) Historical Sites and Monuments

The repealed Antiquities Act 1976 contained quite extensive provisions for the protection of historical terrestrial environments in Malaysia in particular for the protection of historical monuments and historical sites. The Act simply defined 'historical site' as a site that has been declared as historical site in accordance with the provisions of section 15 of the Act.<sup>67</sup> The National Heritage Act 2005 does not import the same term and definition, since sites are now recognised as 'heritage sites' whether cultural or natural.<sup>68</sup> In the same way that any object may automatically become an 'antiquity' upon attaining the age of 100 years old, 'ancient monument' also qualifies automatically as such if it can be reasonably believed to be at least 100 years old.<sup>69</sup>

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<sup>65</sup> Technically, treasure trove is also a form of tangible heritage but for the purpose of legal definition, treasure trove has a distinct meaning.

<sup>66</sup> Historical object is 'any object or any artefact or other object to which religious, traditional, artistic or historic interest is attached and includes any –

- (a) ethnographic material such as a household or agricultural implement, decorative article, personal ornament;
- (b) work of art such as carving, sculpture, painting, architecture, textile, musical instrument, weapon and any other handicraft;
- (c) manuscript, coin, currency note, medal, badge, insignia, coat of arm, crest flag, arm and armour;
- (d) vehicle, ship and boat, in part or in whole, whose production have ceased.

See; sec. 2(1) of the National Heritage Act 2005 and sec. 2(1) of the Antiquities Act 1976.

<sup>67</sup> Section 2(1) of the Antiquities Act 1976. In the same format, 'ancient monument' is also defined as any monument which has been declared as ancient monument according to section 15 of the Act.

<sup>68</sup> Sec. 24 of the National Heritage Act 2005.

<sup>69</sup> Sec. 2(1) of the National Heritage Act 2005 and sec. 2(1) of the Antiquities Act 1976.

Although the age requirement for 'antiquities' is now reduced to 50 years,<sup>70</sup> in any case, the Heritage Commissioner is vested with a wide discretionary power to declare any monument to be an ancient monument or a site as heritage site.<sup>71</sup>

Monument is defined under the Heritage Act as 'architectural works, works of monumental sculpture and painting, elements of structures of an archaeological nature, inscriptions, cave dwellings and combination of features, which are of outstanding universal value from the view point of history, art or science.'<sup>72</sup> This definition of monument appears to be quite restrictive to certain built environments and does not seem to extend to underwater cultural heritage and the site where it is located on. The definition could have been extended to include submerged lands, which were once inhabited by humans or which were once subject to human activities. It must also be noted that the definition of 'monument', which hinged upon 'religious, historic, traditional or archaeological' significance under the repealed Antiquities Act 1976, was not retained under the National Heritage Act 2005.

#### **4.4 Ownership of the Underwater Cultural Heritage**

##### **4.4.1 Assertion of Jurisdiction**

Current law relating to underwater cultural heritage extends to territorial waters of Malaysia. The assertion of jurisdiction by the government is found in section 61 of the

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<sup>70</sup> In the opinion of the author, age requirement of 50 years is a confusing element under the present law. The provision on underwater cultural heritage recognises the age requirement as 100 years.

<sup>71</sup> Sec. 24 of the National Heritage Act 2005. Previously, under sec. 15(1) of the Antiquities Act 1976, it was the Minister in charge who had the power to declare historic monument or site.

<sup>72</sup> Sec. 2(1) of the National Heritage Act 2005. This definition is much simpler than the one adopted under the Antiquities Act 1976, which defined 'monument' as: any temple, church, building, monument, port, earthwork, standing stone, *keramat*, cave or other structure, erection or excavation, and any tomb, tumulus or other place of interment or any other immovable property of a like nature or any part or remains of the same, the preservation of which is a matter of public interest, by reason of the religious, historic, traditional or archaeological interest attaching thereto, and includes the site of any monument and such portion of land adjoining such site as may be required for fencing or covering in or otherwise preserving any monument and the means of access thereto'.



National Heritage Act 2005 which provides 'any person who discovers an underwater cultural heritage in the *Malaysian waters* shall, ... give notice of such discovery to the Commissioner...'. Malaysian waters is defined under the Act as 'the territorial waters of Malaysia determined in accordance with the Emergency (Essential Powers) Ordinance No. 7 of 1969.<sup>73</sup> Thus the law only extends to the outer limit of the territorial waters of Malaysia. It must be recalled that, as discussed in chapter 2, although the government made a specific declaration upon ratifying 1982 UNCLOS that no party shall remove any objects of archaeological or historical nature from the maritime zone it asserts jurisdiction but no law has so far been amended to give effect to this declaration. As such, in the light of clear reference to 'territorial waters' in the scope of application of the National Heritage Act 2005, it must mean the law is applied only to the extent of such zone.

Is this therefore interesting to note that private salvor companies such as the Nanhai Marine Archaeology Sdn Bhd has always sought permission from the Malaysian government before embarking in survey and recovery projects even in maritime areas where the laws were obviously not extended to. The wreck of *Royal Nanhai* was for instance discovered some 40 nautical miles from the Malaysian shore and the salvor, Mr. Sten Sjostrand claimed to have contacted the UNESCO seeking for clarification over such issue and the reply was that 'Neither Malaysia nor Thailand have... any specific legislation protecting historic wrecks beyond the territorial sea.'<sup>74</sup> Indeed this is the legal position in both countries today. The salvor was clearly under the impression that he was not obliged to inform the Malaysian authorities of his find.<sup>75</sup>

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<sup>73</sup> PU(A)307A/1969

<sup>74</sup> Sjostrand, S., Adi Haji Taha and Samsol Sahar, *Mysteries of Malaysian Shipwrecks*, 2006, p. 127.

<sup>75</sup> Ibid.



#### 4.4.2 Federal Government Ownership over Underwater Cultural Heritage

Section 48(4) of National Heritage Act 2005 provides that 'all undiscovered objects whether lying on or hidden beneath the surface of the ground or in any river or in the sea, shall be deemed to be the absolute property of the Federal government'.<sup>76</sup> This position basically retains the one in the Antiquities Act 1976, which provided that 'all undiscovered antiquities (other than ancient monuments) either lying or hidden beneath the surface of the ground or in any river or lake or in the sea, shall be deemed the absolute property of the Government'.<sup>77</sup> As far as ancient monuments were concerned, the repealed Act provided that they should be deemed the absolute property of the Federal government if they are 'not owned by any person or the control of which is not vested in any person as a trustee or manager'.<sup>78</sup> It also further provides that 'if the said object is at a later date found to be discovered on or in alienated land the provisions of subsections (1) and (2) shall apply'.<sup>79</sup> This provision is intended to protect any objects of heritage located on privately owned land from being disposed of without any control from the Government. This position is the same one introduced under the Antiquities Act 1976.

#### 4.4.2 State Government Ownership

Since treasure trove is in the State List, the law imposes an obligation upon the discoverer to report such discovery to the State concerned. The National Heritage Act 2005 clearly provides that 'any person who discovers any treasure trove shall,

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<sup>76</sup> The Antiquities Act 1976 also provided that all matters pertaining to the ownership of antiquities discovered in West Malaysia remain within the legislative power of the Federal government and that such objects are the absolute property of the Government (Sec. 3(1) of the Antiquities Act 1976) and see also under the Federal List, Federal Constitution.

<sup>77</sup> Section 3(3). The word 'Government' as used in Antiquities Act 1976 means the Federal Government. See Section 2(1) of the Act.

<sup>78</sup> Section 3(2) of the Antiquities Act 1976. In the event that the monument is situated on a privately owned land, it does not mean that the owner may dispose of the monument as he thinks fit.

<sup>79</sup> Ibid.

immediately give notice of such discovery to the Commissioner or District Officer of the District where the treasure trove was discovered and shall deliver the treasure trove to the District Officer who shall acknowledge receipt.<sup>80</sup> In the event that ownership of a discovered treasure trove could not be established, the District Officer may declare the treasure trove to be 'ownerless' and he may, using the following procedure, give effect to such declaration:

- (a) if 'upon such inquiry the District Officer found sees no reason to believe that the treasure trove was so hidden', or
- (b) 'where a period is fixed under section 27, no suit is instituted as aforesaid within such period to the knowledge of the District Officer', and
- (c) where 'such suit is instituted within such period and the plaintiff's claim is finally rejected'.<sup>81</sup>

As a protective measure, although the declaration made by the District Officer is final and conclusive,<sup>82</sup> it is still subject to an appeal by any person aggrieved by it.<sup>83</sup> In the case of treasure trove which is considered ownerless, and for the purpose of the disposal of said treasures, the State authority may exercise discretion to reward the finder of the treasure trove as well as the owner of the land where it was found such sums as it may think fit.<sup>84</sup>

#### 4.4.3 Notice or Report of Discovery of Objects

It is universally acknowledged that the duty to report archaeological finds to relevant authorities serves as a control mechanism in protecting cultural heritage. The UNESCO Recommendation on International Principles Applicable to Archaeological Excavations

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<sup>80</sup> Sec. 74(1) of the National Heritage Act 2005. See also sec. 23 (1) of the Treasure Trove Act 1957 (Revised 1995) (Amending Law No. 332/58: Act 168). See also Section 23(1) of the Sabah Antiquities and Treasure Trove Enactment 1977.

<sup>81</sup> Sec. 77(1) of the National Heritage Act 2005 and sec. 28(1) of the treasure Trove Act 1957 (Revised 1995).

<sup>82</sup> Section 28(2), Ibid.

<sup>83</sup> Section 28(3), Ibid.

<sup>84</sup> Section 30, Ibid.

(1956) for instance provides that it is the obligation on the part of the 'person finding archaeological remains to declare them at the earliest possible date to the competent authority'.<sup>85</sup> The imposition of such obligation is commonly found in legislation dealing with cultural heritage and archaeological finds. What is not so universally common is the actual method of reporting. Previously, the repealed Antiquities Act 1976 imposed an obligation on person who discovers 'any object or monument', which the person 'has reason to believe to be an antiquity or ancient monument' to the relevant authority.<sup>86</sup> It is crucial that the knowledge of this discovery is made known as soon as possible to the community leader ('*Penghulu* or '*Penggawa*') of the area or to the District Officer wherein the antiquity was discovered.<sup>87</sup> In fact, the law also requires the finder to deliver the discovered antiquity (himself), 'if it is practicable' to do so, to the District Officer, who in return shall give an acknowledgment of receipt.

The imposition of this duty to hand over objects exists only 'if it is practicable to do so'. This phrase 'if it is practicable to do so' serves the need for the practicability of handing over a find to the relevant authority as a precautionary and safety measure to protect a particular heritage object from being lost or stolen. While this is a logical step, it may be archaeologically incorrect to impose such obligation on the finder since the finder himself may not be archeologically trained and is also not in the best position to know or ascertain whether a particular find is of any historical or cultural value.<sup>88</sup>

In fact, it is actually worth considering if it would be better to impose a duty on the finders not to move such finds away from their original spot, although the danger is

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<sup>85</sup> Article 5(b) of the UNESCO Recommendation.

<sup>86</sup> Sec. 4(1) of the Antiquities Act 1976.

<sup>87</sup> In a smaller villages, the community leader is called Tok Empat. In the Malay community, these community leaders generally serve very important role such as in solving disputes (non-judicial) and other matters relating to religion and to the intetest of the community of the *Kampung* (village) in general.

<sup>88</sup> Lyndel V. Prott and Patrick J. O'Keefe, *Law and Cultural Heritage*, p. 208.

that looters may get to the site first before the authority. The Antiquities Act 1976 was unfortunately silent on this. However, if such a duty (not to move the object) were to exist, the question then is whether there is a need to mark the site wherein the object was found. However, some commentators have argued that 'unless some kind of guard is to be mounted on the site immediately, a marker might only serve to encourage looters, so the caution shown by the archaeological authorities on this issue may be warranted'.<sup>89</sup> As far as the underwater sites are concerned, it is often argued that 'the sites of individual objects and even of large wrecks can be lost while the finder is reporting the matter.'<sup>90</sup> In Malaysia, the Department of Museums has from time to time had to face such problems and the looters meanwhile get away with the bounty.<sup>91</sup> This is also one of the reasons why Department of Museums is keeping the locations of historical shipwrecks, which are yet to be surveyed and studied from public knowledge. The advantage of 'marking' is that it ensures the safety of mariners and fishers in related areas and it prevents unintentional 'damage by fishermen who might otherwise drag their nets over the wreck site.'<sup>92</sup>

In the United Kingdom, a site will be properly marked once designated as a shipwreck site and it will also be shown on the appropriate Admiralty chart.<sup>93</sup> In some common law jurisdiction, the act of marking itself is an offence if it is done prior to obtaining a license.<sup>94</sup> In Malaysia, there is no comparable legal provision addressing this issue. However, most countries with specific legislations on historic wrecks apply more or less the same scheme. The approach to be adopted no doubt will need to 'depend on the resources available for surveillance, the threat posed by unauthorised excavators

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<sup>89</sup> Ibid, p. 210.

<sup>90</sup> Ibid.

<sup>91</sup> Interview with Tuan Haji Khairuddin, Department of Museum and Antiquities, Kuala Lumpur.

<sup>92</sup> Lyndel Prott and Patrick J. O'Keefe, above, p. 210.

<sup>93</sup> Department of Trade (United Kingdom) *Historic Wrecks: The Role of the Department of Trade* (Department of Trade, London, 1979), p. 2.

<sup>94</sup> Section 30 of the Wreck and Salvage Act 1959 (Bermuda).

and treasure seekers, and the possibility of [irreversible] damage being done if there is no marker.<sup>95</sup> In practice, however, this accelerates the destruction and other illegal activities affecting these treasures.<sup>96</sup> For example, section 15(1) of the Antiquities Act 1976, provides that, once declared as 'ancient monuments' by the relevant authority, all objects of historical and cultural value are to be gazetted as 'ancient monuments'. It is also an offence to remove, deface or destroy them.<sup>97</sup> While this may sound effective, it actually encourages land owners to destroy invaluable cultural property in order to avoid compulsory land acquisition by the State Government for the purpose of gazetting the said 'ancient monuments'.<sup>98</sup>

One of the main problems with the repealed Antiquities Act 1976 in relation to underwater cultural heritage was that, while the law makes it the obligation of the finder to report the discovery of items specified in the Act, it does not effectively provide protection for the discovered sites in the interim period between discovery and the declaration of a particular site by the Director General of the Department of Museums. Under the previous law, protection could only be afforded when particular issue or discovery has been referred to the National Committee on the Management of Historical Wrecks. Technically, while the deliberation is taking place, the site in question could have been plundered. The question of interim protection during the committee consultation did not exist within the committee jurisdiction. This problem has now been addressed under the National Heritage Act 2005, which provides that the Heritage Commissioner, 'upon determining to designate a site as a heritage site',<sup>99</sup> and:

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<sup>95</sup> Lyndel Prot and Patrick J. O'Keefe, above, p. 210.

<sup>96</sup> Information by the Department of Museums, Kuala Lumpur.

<sup>97</sup> Section 28(3) of Antiquities Act 1976.

<sup>98</sup> Mohd Yatim, Dr. Othman, above, p. 4.

<sup>99</sup> Sec. 27(1) of the National Heritage Act 2005.

Upon a notice being served on the owner of a site under section 27(1),... may, with the concurrence of the State Authority, make an Interim Protection Order in relation to a site if in the opinion of the Commissioner it is necessary to do so for the purpose of conservation and preservation of the site.<sup>100</sup>

No special provision on interim protection provided for under the chapter on underwater cultural heritage and one can only assume that the above provision relating to interim protection orders can also be applied to areas where any heritage site can be located.

#### 4.4.4 Reward System

The hallmark of the system of reporting any finds of 'antiquity' or treasure trove is the mechanism of rewarding the finder as an incentive in reporting such findings. The reward system ensures that ownership of antiquities including underwater cultural heritage remains with the Federal government or the state government of Sabah and Sarawak. The system also seeks to prevent historical objects of national interest or of national significance from being disposed off commercially and ending up in a private collection divorced from its historical and cultural context. Particularly in the case of underwater cultural heritage, as policing in coastal areas is an issue,<sup>101</sup> such a system would be an effective mechanism in preventing the irretrievable dispersal of objects of historical value. As far as a reward system pertaining to the discovery of terrestrial historical objects or artefacts is concerned, it has been proven to be a workable mechanism. In the State of Sarawak alone, for example, in Binggai Yawan since early 2000, there has been around 10,000 ancient artefacts of ceramics, bronze, pottery and gold found in the area by the villagers and they were reported to the State Museum

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<sup>100</sup> Sec. 33(1), Ibid.

<sup>101</sup> However, education is still a paramount issue that will ensure that 'reward system' be effective. It has been reported that fishermen were simply not bothered to report discoveries of underwater cultural heritage in shallow waters and they were simply content on selling them off to middle man even as scrap metal!

Department.<sup>102</sup> The Department continues to evaluate the artefacts to assess the quality and value of the artefacts with a view of making reward compensation to the finders.

#### 4.5 Establishment of the Protected Zone

Under previous law, apart from protecting historical sites and ancient monuments, the law only provided special provisions in the establishment of archaeological reserves. The term 'archaeological reserve' was not defined under the Act save for one mention that an archaeological reserve may be created 'for the purpose of this Act'.<sup>103</sup> There is no specific provision for the establishment of a special zone for heritage objects and sites located in any of the maritime zones. Consequently, all provisions relating to the creation of archaeological reserves were heavily centered on historical sites and ancient monuments, in which case, the State authority (if it involves a State land) or the Minister (if it involves the Federal territory) may declare any specified area to be an archaeological reserve on the recommendation of the Director-General.<sup>104</sup> The main function of an archaeological reserve is to prohibit acts that would constitute encroachments to the site unless permitted by the Director-General and subject to the conditions set out in the license for the conduct of such activities.<sup>105</sup>

Although the provisions for the creation of archaeological reserves were completely deleted under the National Heritage Act 2005, replaced only with general provisions on the designation of heritage site,<sup>106</sup> the new Act addresses this issue in relation to underwater cultural heritage by making provision for the creation of a 'protected

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<sup>102</sup> The news was posted at: <http://www.museum-security.org/03/026.html> (last visited February 2005).

<sup>103</sup> Sec. 19 of the Antiquities Act 1976.

<sup>104</sup> Ibid.

<sup>105</sup> Sec. 20 of the Antiquities Act 1976 provided that, the following acts are prohibited in archaeological reserves : (a) clear to break up for cultivation or cultivate any part of an archaeological reserve; (b) erect any building or structure on any such reserve (c) fell or otherwise destroy any tree standing on any such reserve; or (d) otherwise encroach on any such reserve.

<sup>106</sup> Sec. 112 of the National Heritage Act 2005 provides for offences in relation to heritage sites.



zone'.<sup>107</sup> The Act provides that 'the Minister may, on the advice of the Commissioner, declare in the notice published in the Gazette, any area within which an underwater cultural heritage is situated to be a protected zone.'<sup>108</sup> However, the Act does not provide for the limit of the entire area over which the remains of underwater cultural heritage may be protected and it has yet to publish further regulations relating to protected zone. In Australia, the law provides that a protected zone cannot exceed 100 hectares and that such an area may consist in part of sea and in part of land.<sup>109</sup>

As in the case of the archaeological reserves under the Antiquities Act 1976, there is a prohibition of conduct - 'any activity in the protected zone except with the approval in writing from the Commissioner.'<sup>110</sup> However, unlike the previous provision on archaeological reserves, the new Act does not specifically describe the nature of activities prohibited in the protected zone. It is understood that further regulations may be prescribed by the Minister in charge on the nature of activities that are prohibited in the zone. However, it is submitted that relevant laws and regulations pertaining to the establishment of marine parks provide suitable guidelines on the matter.<sup>111</sup> In fact, this is one area where the management of marine parks and protected areas could be integrated as one unit to save cost and optimise labour. Currently, however, no 'protected zone' has been designated under the new Act. In fact, none of the first 50

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<sup>107</sup> Sec. 64 of the National Heritage Act 2005.

<sup>108</sup> Sec. 64(1), Ibid.

<sup>109</sup> Australia Shipwreck Act 1976, sec. 7.

<sup>110</sup> Sec. 64(2), Ibid.

<sup>111</sup> Sec. 43 of the Fisheries Act 1984 provides that, within the marine parks, no one is allowed to do; (a) Fishing or an attempt to fish b) Removing or taking into possession of any aquatic animal or aquatic plant or part thereof, whether dead or alive, (c) Collecting or taking into possession of any coral, dredges or extracts any sand or gravel, discharges or deposits any pollutant, alters or destroys the natural breeding grounds or habitat of aquatic life, or destroys any aquatic life, (d) Constructing or erecting any building or other structure on or over any land or waters within a marine park or marine reserve, (e) Anchoring any vessel by dropping and any kind of weight on, or by attaching any kind of rope or chain to, any coral, rock or other submerged object (emphasis added), or (f) Destroying, defacing or removing any object, whether animate or inanimate, in a marine park or marine reserve'.



national heritage items on the National Heritage Register<sup>112</sup> publicised in July 2007 included any underwater cultural heritage site, some of which had been excavated or exhibited at the semi permanent Maritime Archaeology Museum in Kuala Lumpur. The sunken World War II Japanese submarine near Darwin Harbour is a fine example of designated historic wreck site.<sup>113</sup> No doubt, although the implementation of this can be costly to the heritage department, it is worth considering.<sup>114</sup> After all, if the government decides to ratify the UNESCO Convention 2001, it has to be mindful of the principle at the heart of this convention i.e. *in situ* preservation as the preferred method of preserving the underwater cultural heritage. The law as it stood under the Antiquities Act 1976 did not make any provision for this, so the protection of the site of the historic wrecks in Malaysia was, at least, in terms of legal mechanism provided, in total neglect. By way of comparison, in the UK, the Protection of Wrecks Act 1973 empowers the authority to protect such areas from intrusions, which might come in the form of diving, excavation and salvage if carried out illegally. Elsewhere in Australia, the Minister is empowered to declare an area consisting of sea, or partly of sea and partly of land, within which a historic wreck is situated as a protected zone.

#### 4.6 Maintenance of Historical Site and Monument

The National Heritage Act 2005 does not specifically provide for the maintenance of underwater cultural heritage sites although it does provide that underwater cultural

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<sup>112</sup> The first 50 of 'National Heritage' items list was launched earlier in June this year. Items from the register included heritage items or sites from various categories; natural heritage, moveable cultural heritage as well as intangible heritage. Information on heritage items is accessible online at <http://www.heritage.gov.my> under the website of the Department of Heritage.

<sup>113</sup> For example, Japanese submarine I-124 is protected under Australia Historic Wrecks Act (information available at: [http://en.wikipedia.org/wiki/Japanese\\_submarine\\_I-124](http://en.wikipedia.org/wiki/Japanese_submarine_I-124)). (Last visited May 2008).

<sup>114</sup> The semi-permanent maritime museum had to be closed recently and the whole exhibition items are now under the process of being moved to another venue. Verbal information was intimated to this researcher by an official at the Museums that the new maritime museum will be located in the state of Negeri Sembilan.

heritage may be preserved in situ.<sup>115</sup> In fact, pursuant to the establishment of a protected zone as mentioned above, although there are several provisions included to govern salvage and excavation activities, one finds no special provisions in terms of care and maintenance to the zone. Therefore, one needs to look at the general provisions applicable to the maintenance of a 'heritage site' and 'heritage objects' in terms of examining the possible process involved in maintaining an underwater cultural heritage that is to be preserved in situ. This particularly so in the case of underwater cultural heritage in the form of remnants of ancient ports, which are obviously under the jurisdiction of the individual State's concerned.

Maintenance is necessary for the continuous protection and care of a cultural heritage or conservation area and it must be distinguished from the word 'repair' which simply involves 'restoration' or 'reconstruction'.<sup>116</sup> Archaeologically speaking, destruction of a particular site means the loss of a non-renewable resource, be it an historical site, a site where an ancient monument sits, and whether it be underwater or terrestrial. Intrusive and destructive disturbances to an underwater site may come in many forms. It could be a natural disturbance like the weather or living organisms in the sea. It could also be a man made disturbance such as from uncontrolled and destructive fishing activities, treasure hunting, pollution from ships, demolition, land-based pollution, land reclamation and so on.

At the State level, when it comes to the preservation and conservation of the State's cultural heritage which includes coastal cultural heritage, the State Authority acts on the advice given by a special committee established for 'matters of policy,

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<sup>115</sup> Compare with the language of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage to which Malaysia voted in favour, in situ preservation shall be considered as the first method of preservation. See preamble to the Convention, art. 2(5) and Rule No. (1) of the Annex Rules of the Convention.

<sup>116</sup> Section 2(1) of Malacca Preservation and Conservation of Cultural Heritage Enactment 1988.

administration and management of cultural heritage and conservation areas.<sup>117</sup> Only four States within the Federation have so far established this special committee within their constituency; i.e. State of Malacca, Johor, Sabah and Sarawak. Membership of such committees normally consists of the Chief Minister of the State (as Chairman), the Deputy Chairman, the State Secretary, the State Legal Adviser, the State Financial Officer, a representative of the Director-General of the Department of Museums, a representative from the Director of the State Public Works Department as well as not more than five other persons who have wide experience and expertise in the field of preservation and conservation of cultural heritage.

Although the protection of historical sites and ancient monuments are a Federal matter, the concurrence of the State Authority must first be obtained if the site or monument is situated on State land.<sup>118</sup> Once a declaration has been made, the Director General may with the approval of the Minister or State Authority, publish in the Gazette a schedule of ancient monuments as well as historical sites.<sup>119</sup> The Director-General may make amendments or any addition to the schedule from time to time as necessary subject to such approvals from the Minister or the relevant State Authority.<sup>120</sup> Once ancient monuments and historical sites have been duly declared, the following list of acts and activities are strictly prohibited.<sup>121</sup> Section 16(a) of the Act provides that 'no person shall, without the permission in writing of the Director-General after consultation with the Minister, and except in accordance with such conditions as he may impose in granting such permission to:

Dig, excavate, plant trees, quarry, irrigate, burn lime or do similar work or deposit earth or refuse on in the immediate neighbourhood of an ancient monument or a historical site included in the schedule published in

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<sup>117</sup> Section 3(1) of the Malacca Preservation and Conservation of Cultural Heritage Enactment 1988.

<sup>118</sup> Section 15(1) of the Antiquities Act 1976.

<sup>119</sup> Ibid. Sec. 15(2).

<sup>120</sup> Ibid.

<sup>121</sup> Ibid. Sec. 16.

accordance with section 15 as added to or amended from time to time, or establish or extend a cemetery on a historical site so included.

As is the case with maintaining historical sites, maintaining ancient monuments starts with prohibiting certain acts over the monument itself. Apart from acts of demolishing an ancient monument, it also includes any act to 'disturb, obstruct, modify, mark, pull down or remove any such monuments or any part thereof' and it is an offence to 'make alteration, additions or repairs to any ancient monument' or 'erect buildings or walls abutting upon an ancient monument'.<sup>122</sup> The law also allows the authority to conduct inspections of these ancient monuments and historical sites<sup>123</sup> at reasonable times. This inspection process includes the conduct of 'any study or work necessary for the restoration, repair, alteration, maintenance or conservation thereof.'<sup>124</sup> In the case of privately owned land on which a particular cultural heritage is situated and has been declared, the Local Authority may conduct inspection of that cultural heritage or conservation area subject to being authorised by the State Authority and to the work being done at reasonable times.<sup>125</sup> Beyond this, the Local Authority may 'either orally or in writing' require any person to supply them with information relating to anything which is believed (on reasonable grounds) to be a cultural heritage or conservation area.<sup>126</sup> This also means that the person who is in possession of a cultural heritage or conservation area has the duty 'to permit such inspection and to give reasonable facility and assistance'<sup>127</sup> necessary for the purpose of restoration, repair, alteration, maintenance, preservation and conservation.

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<sup>122</sup> Sec. 17.

<sup>123</sup> Section 18.

<sup>124</sup> Sub-section (1).

<sup>125</sup> Section 8(1)(a).

<sup>126</sup> Section 8(1)(b).

<sup>127</sup> Ibid. Section 8(2).

Theoretically speaking, the requirement to obtain consent of the landowner seems reasonable and necessary. In practice, however, this is easier said than done. According to the Department of Museums, the main problem that arises here is the difficulty in obtaining consent of the owner or the consent of State authority. From over 1000 immovable properties listed in the Department's inventory, only about 20% have been gazetted under the law.<sup>128</sup> The lack of incentive and the fact that the law does not require the Department to share the financial burden in preserving and maintaining the gazetted property seems to be the major cause of this problem. More importantly, although it is the duty of the Local Authority 'to formulate and publish' such 'proposals and programs for the purpose of the preservation or conservation and enhancement of cultural heritage or conservation area within its locality', the Local Authority may require the owner of the cultural heritage or conservation area to submit such proposals within a prescribed time subject to the approval of the Local Authority.<sup>129</sup>

#### **4.7 Excavation and Salvage**

Since the Federal Government governs matters pertaining to underwater cultural heritage, all applications for license to carry out any excavation works involving the underwater cultural heritage must be made direct to the Heritage Commissioner.<sup>130</sup> However, the consent of the private landowner is needed (if it is located on a private land) as well as the consent of State government (if it is located on a State land). The most important key to this process of regulating excavation works is the licensing system. Before any excavation may be given the green light, applicants must obtain a

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<sup>128</sup> Interview with Tuan Haji Khairuddin of the Department of Museum and Antiquity, Kuala Lumpur, April 2004.

<sup>129</sup> Section 7(4) of the Malacca Enactment 1988.

<sup>130</sup> Previously to the Director-General of the Department of Museum. See sec. 10 of the Antiquities Act 1976.

licence from the Heritage Commissioner.<sup>131</sup> Conditions for the purpose of this licence are clearly set out in the Act itself.<sup>132</sup>

#### 4.7.1 Conditions for Licence

No excavation activities may commence without a licence.<sup>133</sup> The licensing system was created in order to prevent clandestine excavation activities that are unsupervised, not subject to any control, and would only result in damage to the archaeological site and to the cultural property. Under the previous law, when a licence expired, it had to be renewed before any further work could be carried out.<sup>134</sup> This requirement is also retained under the new Act.<sup>135</sup> The National Heritage Act does not provide conditions specific for the granting of a licence in excavation work involving underwater cultural heritage. It merely provides for the granting of a licence by the Heritage Commissioner for excavation in general, particularly designed for the granting of excavation on land, as opposed to application for salvage on the seabed. The wording of the following provision explains the terrestrial nature of the granting of the licence to excavate:

Application for licence to excavate shall:

- (a) be made to the Commissioner in the prescribed form
- (b) containing full and accurate description of the land on which it is proposed to be carried out, the purpose, the nature and extent of the proposed excavation and such other particulars as may be required<sup>136</sup>

In addition to the above, no licence shall be approved unless the Commissioner is satisfied that;

- (a) the owner of the land where the proposed excavation is to be made has consented to the excavation;

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<sup>131</sup> Sec. 64(1) of the National Heritage Act 2005. Sec. 9 of the Antiquities Act 1976.

<sup>132</sup> For the previous provision, please see; section 11 to Art. 12 of the Antiquities Act 1976.

<sup>133</sup> See Annex (2) for the current prescribed forms under the National Heritage Act 2005. Previously, under the Antiquities Act 1976, the prescribed form was form A (JM/PK/5).

<sup>134</sup> See Annex II - Prescribed forms: Form C (JM/PK/7).

<sup>135</sup> See Annex (3) for the Prescribed form under the National Heritage Act 2005.

<sup>136</sup> Sec. 87 of the National Heritage Act 2005.

- (b) the proposed excavation will not cause any damage or inconvenience to persons residing in the vicinity of such land, or to any place used for religious purposes, or to any cemetery, school, water source or supply, irrigation or drainage works or public road, or that if any such damage is likely to be caused adequate provision has been made by the applicant for the payment of compensation; and,
- (c) the applicant is able to furnish security for the due observance by him of any conditions imposed on the licence or any regulations as may be prescribed.<sup>137</sup>

It must be noted that the granting of a licence by the relevant authority is only discretionary and it does not occur as of right. In addition to any other conditions which may be either prescribed generally or specified in a particular case, every licence granted shall also be subject to the other conditions in order to ensure that the excavation activities carried out will follow a high archaeological standard.<sup>138</sup> The licence to excavate may be extended by the Heritage Commissioner at the expiration of the date of which it was granted for such further period 'as he thinks fit.'<sup>139</sup> Likewise, any licence to excavate may be cancelled at any time before the expiration of the period for which it was granted. If this is the case, 'the holder thereof shall not be entitled to claim compensation for any loss or damage suffered or alleged to have been suffered by him by reason of such cancellation.'<sup>140</sup>

#### 4.7.2 Excavation Rules

Excavation rules provided under the Antiquities Act 1976 are not retained under the National Heritage Act 2005. It is understood that the Minister in charge may prescribe

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<sup>137</sup> Sec. 88(2) of the National Heritage Act 1976.

<sup>138</sup> Sec. 89 of the National Heritage Act 2005. Sec. 12(2) of the Antiquities Act 1976. Sec. 124(1) of the National Heritage Act provides that 'the Minister may make any regulations...(d) providing for procedures for application, terms and conditions to be imposed on licences, and for fees, charges and deposits in respect thereof, including provisions for forfeiture, use or return of such deposits.'

<sup>139</sup> Sec. 90(1) of the National Heritage Act 2005. Sec. 13(1) of the Antiquities Act 1976.

<sup>140</sup> Sec. 90(3) of the National Heritage Act 2005. Sec. 13(2) of the Antiquities Act 1976.



further rules and regulations under the Act.<sup>141</sup> Such further regulations have yet to be published. The previous Act, however, provide some practical rules regarding the documentation and management of excavation activities directed at underwater cultural heritage as follows;

- (a) the holder of the licence shall take all reasonable measures for the preservation of the antiquities discovered by him;
- (b) the holder of the licence shall carry out his excavations in a scientific manner and to the satisfaction of the Director-General;
- (c) the holder of the licence shall keep a record of all antiquities discovered in the course of the excavation;
- (d) the holder of the licence shall, within a reasonable time, deposit with the Director-General such photographs, casts, squeezes or other reproductions of any antiquity apportioned to him in accordance with section 6 as the Director-General may require;
- (e) the holder of the licence shall furnish such plans and photographs of his excavations and the Director-General may require.<sup>142</sup> In this respect, 'such photograph, cast, squeeze, reproduction or plan shall be held by the Director-General and where a museum exists in the State in which the antiquity was found one copy shall be deposited in such museum.'<sup>143</sup>

Should Malaysia proceed to ratify the UNESCO Convention on the Protection of the Underwater Cultural Heritage 2001, the extensive rules relating to good governance of heritage objects contained in its Annexed Rules will have to be adopted into relevant domestic laws. One of the rules in the Annex specifies that: 'Prior to any activity directed at underwater cultural heritage, a project design for the activity shall be developed and submitted to the competent authorities for authorisation and appropriate peer review.'<sup>144</sup> Although the technical details of such considerations are perhaps best left to the expert consideration of this 'peer review', the composition of the

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<sup>141</sup> Sec. 124(1) (e) of the National Heritage Act 2005 provides that the Minister may provide further regulations for 'prescribing the management and procedures for the conservation and preservation of heritage sites, heritage objects, underwater cultural heritage and National Heritage...'

<sup>142</sup> Section 12(2), Ibid.

<sup>143</sup> Section 12(3), Ibid.

<sup>144</sup> Rule No. 9 of the 'Annex' of UNESCO Convention 2001.



experts as well as the representation of interests (of the users, owners and benefactors of interests) in this review process, which takes place prior to the authorisation by the competent authority, should be well balanced. The membership of the Heritage Council as provided under the National Heritage Act 2005 reflects the wide-ranging heritage issues to be dealt with by the Heritage Council.<sup>145</sup> On this account, specialised membership of the National Committee on the Management of the Historic Wrecks must be expanded or at least maintained<sup>146</sup> and the application and approval process could be made more transparent in order to promote transparency and accountability.

#### 4.7.3 Offence and Penalty

Section 112 of the National Heritage Act provides a list of activities that are considered an offence under the Act if committed without the approval of the Heritage Commissioner. These offenses are offences against a terrestrial heritage site such as a monument and the site it rests on. Offences relating to underwater cultural heritage relate to those acts prohibited in the protected zone, but no further regulations have been published at the moment in order to determine the precise nature of activities prohibited in this zone. Salvage activity or excavation of any underwater cultural heritage must also be licensed, otherwise it becomes an offence.<sup>147</sup> The law provides that 'any person who destroys, damages, disfigures, disposes or alters a tangible cultural heritage, without a permit issued by the Commissioner commits an offence and shall on conviction be liable to imprisonment for a term not exceeding five years or to a fine not exceeding fifty thousand ringgit or to both.' The severity of the penalty has been revised from the one provided under the previous laws to take into account the value of ringgit and the trade in antiquity. Previously, the offenders who caused damage to

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<sup>145</sup> Sec. 10(1) of the National Heritage Act 2005.

<sup>146</sup> See; chapter 3, paragraph 3.5, pp. 133-135.

<sup>147</sup> Sec. 65(1) & (2) of the National Heritage Act 2005.

'antiquities' or an 'ancient monument' were only 'liable to imprisonment not exceeding six months or to a fine not exceeding one thousand ringgit or to both.'<sup>148</sup>

## 4.8 Dealings with Cultural Heritage

### 4.8.1 Cultural Heritage as Property

If a particular cultural heritage or conservation area is of 'exceptional importance',<sup>149</sup> the State Authority may direct the Local Authority to 'make arrangement to purchase or lease by agreement, or acquire the same in accordance with the provision of any written law in relation to the acquisition of land for the time being in force'.<sup>150</sup> If necessary, this could also extend to removing 'the whole or any part thereof, making good any damage done to the heritage or to the area pursuant to such removal'.<sup>151</sup> Compensation will be awarded to private owners and the assessment and amount of such compensation 'shall be settled by agreement'. In the case of a dispute arising from the terms of the compensation agreement, the matter 'shall be submitted to the State Authority whose decision shall be final'.<sup>152</sup> Or, it may also be the case where a building or conservation area is, because of restriction of planning permission, incapable of reasonable beneficial use by the owner, the owner may serve on the Local Authority a 'purchase notice' requiring his land area to be purchased in accordance with relevant laws.<sup>153</sup> It is the duty of the State Authority (in the case of State land) and the duty of Federal government (in the Federal territories) to investigate the claim for a 'purchase notice' and that that the area or the building is incapable of any beneficial use by the owner. Where the claim is well founded, the acquisition procedure will be based on

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<sup>148</sup> Sec. 28(1) of the Antiquities Act 1976.

<sup>149</sup> Section 13 of the Malacca Enactment No. 6 of 1988.

<sup>150</sup> Section 13(a).

<sup>151</sup> Section 13(b).

<sup>152</sup> Ibid.

<sup>153</sup> For instance: see section 9(1) and 10(1) of the *Malacca Enactment 1988* and section 10(1) of the Sabah Cultural Heritage (Conservation) Enactment 1997.

those enumerated in the Land Acquisition Act 1960.<sup>154</sup> This mechanism of 'purchase notice' is of particular significance, not in relation to historic wrecks, as these are not terrestrial as such, but more so where underwater cultural heritage encompasses 'sites, structures, buildings, artefacts and human remains, together with their archaeological and natural context.'<sup>155</sup> The discovery of the old ports in the State of Malacca, located on privately owned land, is a fine example. The problem is that it takes some time before one can actually determine the magnitude of cultural heritage significance of a particular finding, and in the meantime, the landowner may choose to proceed developing the site for commercial projects.

#### **4.8.2 Sale of Cultural Properties**

The sale of any historic object is of course the most obvious form of commercial exploitation. It invites controversy because it may cause an important article or object to end up in a private collection, or somewhere else, severed from its historical and cultural context. The previous legal position under the Antiquity Act 1976 does not prohibit the sale of cultural property, and in fact, one of the powers and responsibilities entrusted to the Director General of the Department of Museums is the power for the sale and disposal of cultural property. This position is largely retained under the National Heritage Act 2005. Nothing in the new Act prohibits the commercial exploitation of a heritage object or an underwater cultural heritage. The main rule is that no one shall deal in antiquities unless he or she is in possession of a dealer's licence granted by the relevant authority.<sup>156</sup> The Heritage Commissioner himself may deal with any heritage object or site. One of the powers of the Heritage Commissioner is 'to convey, assign, surrender, yield up, charge, mortgage, demise, reassign, transfer, or otherwise dispose of, or deal with any movable or immovable property, vested in the

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<sup>154</sup> This is a Federal legislation and will also apply to the States of Sabah and Sarawak.

<sup>155</sup> Article 1(a)(i) of the 2001 UNESCO Convention.

<sup>156</sup> Section 33 of the Antiquities Act 1976. See Annex III. Prescribed form: Form A (Application for a Licence to Deal in Antiquities). See: Rule 3 of the Antiquities (Dealer's Licences) Rules 1976.

Commissioner..<sup>157</sup> The new law does not provide for the conditions in which case the Commissioner may dispose of cultural property.<sup>158</sup> As far as dealing of heritage objects privately owned by people, the National Heritage Act provides that:

- (1) The Commissioner may by notice in writing require any person in possession of any heritage object which is deemed to be of national importance or interest, not to sell or dispose of such object without prior written consent of the Commissioner.
- (2) Any person who receives such notice shall not sell or dispose of any heritage object in his possession or custody.
- (3) Within the period of 30 days from the date of the notice under subsection (1) the Commissioner shall have the first right to purchase such heritage object at an agreeable value.
- (4) Any person who contravenes subsection (2) commits an offence and shall on conviction be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding one year or to both.<sup>159</sup>

The law is drafted in order to strike a balance between the freedoms of trade in privately owned heritage objects and the protection of national interest. In addition, general principles relating to offences against property and on to theft and stolen property as provided in the Penal Code Chapter XVII (Malaysia Act 574) will, with regard to offences against property, be applicable too. The Act also makes it an obligation for anyone believed to be in possession or in custody of a movable underwater cultural heritage to provide 'full information of such moveable underwater

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<sup>157</sup> Sec. 7(c) of the National Heritage Act 2005.

<sup>158</sup> Previously, under the Antiquities Act 1976, sec. 32 of the Act provide that the Director-General of the Department of Museum and Antiquity may also sell any antiquities or historical objects 'if requested by the Government'

<sup>159</sup> Sec. 56 of the National Heritage Act 2005. Cf. sec. 35 of the Antiquities Act 1976 which provides that the 'Director-General may... require any person in possession of or lawfully entitled to sell or dispose of any antiquity or any historical object... of lasting national importance or interest not to sell or otherwise dispose of such antiquity or historical object' and 'no person shall sell or otherwise dispose of any antiquity or historical object... until after a lapse of ninety days after the giving of notice by such person of his intention to sell or dispose of... [and] it shall be lawful for the Director-General to purchase such antiquity or historical object at a reasonable price notwithstanding any agreement which the owner may have entered into with another person.'

cultural heritage.’<sup>160</sup> Where the person has ceased to be in possession of the object, he ‘shall give the Commissioner particulars of the circumstances in which he ceased to have possession, custody or control of such moveable underwater cultural heritage.’<sup>161</sup> If the property has been transferred to another person, ‘he shall give the Commissioner the name and address of the person to whom such possession, custody or control of such moveable underwater cultural heritage was transferred.’<sup>162</sup>

#### **4.9 Control of Movement of Underwater Cultural Heritage**

In view of the role of Southeast Asia as a transit region for the movement of cultural goods, control over export or import of cultural objects are of particular significance. Like terrestrial antiquities, moveable underwater cultural heritage is susceptible to unlawful activities pertaining to its disposal, thus relevant legal provisions dealing with this control must be examined. Malaysia is a member of the World Cultural and Natural Heritage Convention 1972 but not to the UNESCO Convention on the Illicit Transfer of Cultural Property 1970. The reason why Malaysia is not a member of the 1970 UNESCO Convention is probably because trade in antiquities is not carried out to any considerable extent in Malaysia and the country is also not known to be a major transit point of cultural objects in Southeast Asia comparable to Singapore, Indonesia or Cambodia.

##### **4.9.1 Loans and Exchanges**

Loans and exchanges of historical and cultural objects are a form of legitimate movement of antiquities and other cultural materials. Unlike the Antiquities Act 1976, The National Heritage Act 2005 does not specifically provide for the regulation of loans and exchanges. Under the repealed Antiquities Act 1976, for the purposes of public education and other national and international interests, the Director General was

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<sup>160</sup> Sec. 62(1) of the National Heritage Act 2005.

<sup>161</sup> Sec. 62(2), Ibid.

<sup>162</sup> Sec. 62(3), Ibid.

empowered to make arrangements for loans or exchanges of any antiquities or historical objects with learned societies, museums, or even expert and specialist.<sup>163</sup> On the other hand, under the new Act, the Commissioner for Heritage is empowered to 'do all things as may be incidental to or consequential upon the discharge of his powers and functions'<sup>164</sup> and this could be interpreted to include making ways for loans and exchanges in the context of 'conservation, preservation, restoration, maintenance, promotion, exhibition, and accessibility of heritage.'<sup>165</sup>

#### 4.9.2 Export and Import Control

The National Heritage Act 2005 provides that 'no person shall export any heritage object unless a licence to export has been obtained from the Commissioner'.<sup>166</sup> The act of exporting covers all methods of export including from 'land, sea or air or to place any goods in a vessel, conveyance or aircraft for the purpose of such goods being taken out of West Malaysia by land, sea or air.'<sup>167</sup> The Custom Act 1967, which applies throughout the Federation, gives wide powers to the Minister in prohibiting 'the importation into, or the exportation from, Malaysia or any part thereof, either absolutely or conditionally, or from or to any specified country, territory or place outside Malaysia, or the removal from one place to another place in Malaysia of any goods or class of goods',<sup>168</sup> and in prohibiting 'the importation into, or exportation from, Malaysia or any part thereof, or removal from one place or another place in Malaysia of any goods or class of goods, except at specified ports or places.'<sup>169</sup> The power to decide on the question of 'whether any particular goods are or are not included in a class of goods appearing in an order

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<sup>163</sup> Section 32.

<sup>164</sup> Sec. 6(l) of the National Heritage Act 2005.

<sup>165</sup> Sec. 6(c), Ibid.

<sup>166</sup> Sec. 83(1), National Heritage Act 2005. Annex IV Application's prescribed forms and fees. Rule 4 of the Antiquities (Export Licence) Rules 1976.

<sup>167</sup> Sec. 2 of the Customs Act 1967 9Act 235).

<sup>168</sup> Sec. 31(1)(a), Ibid.

<sup>169</sup> Section 31(1)(b), Ibid.

made'<sup>170</sup> under section 31(1) of the Customs Act 1967 however rests with the Director-General. As far as the conditions for the grant of licence to export heritage objects including the underwater cultural heritage to another country are concerned, section 83 of the National Heritage Act provides that:

(2) the Commissioner shall not issue such a licence if in his opinion the heritage item concerned is reasonably believed to be of national importance or interest.

(3) ...

(4) No licence shall be issued to any person unless he proves to the satisfaction of the Commissioner that he is the owner of such heritage item or that he is acting on behalf of and with the authority of the owner

(5) Where an enforcement officer or a proper officer of customs has any reason to believe that an object or material which is to be exported is a heritage item and without having a valid export licence, he shall detain such object or material and immediately notify the Commissioner within twenty four hours for the determination of such object or material

(6) If the Commissioner is satisfied that the object or material is a heritage item and is or will be of national importance or interest, he may prohibit the export thereof.

(7) Any person who contravenes the provisions of subsection (1) commits an offence and shall on conviction be liable to imprisonment for a term not exceeding ten years or to a fine not exceeding one hundred thousand ringgit or to both.<sup>171</sup>

In this respect, it is crucial that relevant government agencies keep regularly updated inventories of heritage items that are prohibited from being exported to another country without licence or permission.

Another important control mechanism which was absent from the Antiquities Act 1976 was the import control of heritage objects from foreign country. Under the new law, however, it is the duty on the part of the importer of such foreign heritage item 'to notify the Commissioner with the documents certifying that such foreign heritage item

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<sup>170</sup> Section 31(2), Ibid.

<sup>171</sup> Similar provisions are found under sec. 23 of the Antiquities Act 1976.



was lawfully transported out of a foreign country.’<sup>172</sup> This provision serves to prevent the use of any Malaysian territory as an exit point for the smuggling of heritage items or objects into another country.<sup>173</sup> In the case of heritage objects being imported without the proper documents and if ‘there is valid reason to believe that a foreign heritage item which is in transit or has already been imported... unlawfully... the Commissioner may keep it in custody...’<sup>174</sup> In this case the Commissioner will shall ‘keep and manage’ the item as ‘he thinks fit’.<sup>175</sup> However, if it is proven that the item was ‘lawfully transported out of a foreign country, the Commissioner shall return it to the person importing it without delay.’ In addition, ‘where any country has proved that such foreign heritage item was unlawfully exported and requested it be return in accordance with the terms of a treaty... he shall take necessary measures to return it to such country.’<sup>176</sup>

#### **4.10 The Protection Accorded under the National Heritage Act 2005 in light of the 2001 UNESCO Convention**

There is no doubt that international legal development which culminates with the adoption of the 2001 Convention, has influenced the development of legal measures relating to underwater cultural heritage in Malaysia. This is evident from the change of mindset of the drafters of the law from viewing the subject concern as ‘historic wrecks’ to ‘underwater cultural heritage’. The definition of underwater cultural heritage under the National Heritage Act 2005 itself follows closely the definition adopted under the 2001 Convention. In addition, the Recommendations achieved during the 2002 Special Workshop were only critical of those issues involving national security concerns. None of the general objectives and principles of the 2001 Convention were specifically

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<sup>172</sup> Sec. 84(1) of the National Heritage Act 2005.

<sup>173</sup> This is one of the mechanism of control that will also ensure the success of the 2001 UNESCO Convention.

<sup>174</sup> Sec. 84(2) of the National Heritage Act 2005.

<sup>175</sup> Sec. 84(3), Ibid.

<sup>176</sup> Sec. 84(4), Ibid.

objected to. Therefore, it is imperative that the new laws fulfil principles and objectives underlying the 2001 Convention in order to reflect, at least, Malaysia's bona fide commitment in protecting underwater cultural heritage.

#### **4.10.1 Definition and the 'Significance' Test**

As mentioned above, the new law adopts a similar definition of underwater cultural heritage which include the use of similar terms (underwater cultural heritage), similar age requirement (100 years), contents (all traces of human existence) and applying the 'significance' test. There are several differences however to be found within the new Act. While the law provides that the minimum age requirement for underwater cultural heritage is 100 years old, the age requirement of 'antiquities' is set at a minimum of 50 years. There is no scientific justification on the difference between the two. Other studies have also shown that there is not scientific explanation for setting the age requirement of underwater cultural heritage at 100 years old. In Australia, age requirement for historic wrecks is set at 50 years. Other countries such as the UK, set the age requirement at 100 years. Perhaps a more crucial factor determining whether an object qualifies as underwater cultural heritage is the 'character' test. In this regard, another difference is found within the new law. The test for underwater cultural heritage is the 'character' test but the new law also provides that the test to be applied in determining whether an object is a national heritage is the 'significance' test. The legal department at the relevant government ministry was not able to comment on this. Studies are divided on the issues. Some writers support the significance test, such as that applied by the United Kingdom, since it makes more sense to exclude less historically or culturally significant objects. In addition, other experts regard that the expression 'character' is not particularly helpful for the purpose of determining what constitutes underwater cultural heritage. In any case, it is impossible to fully define and measure 'significance' in statutory provisions. National Heritage Act 2005, however,

lists out nine criteria to be considered by the Minister in Charge in determining whether an object (including underwater cultural heritage) is national heritage,<sup>177</sup> and they are as follows:

- (a) Historical *importance*, association with or relationship with Malaysian history
- (b) Good design or aesthetic *characteristics*
- (c) Scientific or technical innovations or achievements
- (d) The social or cultural *associations*
- (e) The potential to educate, illustrate or provide further scientific investigation in relation to Malaysian cultural heritage
- (f) The *importance* of exhibiting a richness, diversity or unusual integration of features
- (g) The rarity or uniqueness of the natural heritage, tangible or intangible cultural heritage, or underwater cultural heritage
- (h) The representative nature of site or object as part of a class or type of a site or object; and,
- (i) Any other matter which is relevant to the determination of cultural heritage *significance*<sup>178</sup>

As emphasised above, linguistically, there is a mix of use the word 'importance', 'significance', 'associations' and 'character' in the list of criteria, there is an obvious greater emphasis on importance and significance. In addition, while there is a specific reference to 'character' test in the definition of underwater cultural heritage, the actual test is 'significance' test as provided under section 2 of the Act.

#### 4.10.2 Control Mechanism

Major control mechanism introduced under the 2001 UNESCO Convention as discussed in chapter 2 include, export and import control, control over use of State port as well as control over State's own national and the reporting system. While certain mechanism can only be effected through bilateral or multilateral cooperation, others can be immediately be implemented through domestic legal measures, particularly

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<sup>177</sup> Sec. 67(1) of the National Heritage Act 2005.

<sup>178</sup> Sec. 67(2) para(a)-(i).

those on the movement of cultural objects, regulation of activities conducted within State's own territories including the imposition of non-use of territory for activities which are against the objectives of the 2001 Convention. Most of these issues have been addressed under the National Heritage Act 2005. However, the following concerns have not been fully addressed or not addressed at all under the new law.

#### **(a) Prohibition of Commercial Exploitation**

The 2001 UNESCO Convention expressly provides that 'the commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage' and consequently, such objects 'shall not be traded, sold, bought or bartered as commercial goods.'<sup>179</sup> Although there are exceptions to the rule, the conditions are particularly difficult to be met and certain experts are of the opinion that it in fact has the effect of barring commercial activities. The conditions are reproduced below:

- (a) The provision of professional archaeological services or necessary services incidental thereto whose nature and purpose are in full conformity with this Convention and are subject to the authorization of the competent authorities;
- (b) The deposition of underwater cultural heritage, recovered in the course of a research project in conformity with this Convention, provided such deposition does not prejudice the scientific or cultural interest or integrity of the recovered material or result in its irretrievable dispersal; is in accordance with the provisions of Rules 33 and 34; and is subject to the authorization of the competent authorities.

The National Heritage Act 2005 simply provides that the Commissioner for Heritage has the power to deal with an object of cultural heritage including underwater cultural heritage as he or she deems fit in accordance with the law. The law, it must be stressed here, does not expressly prohibit commercial exploitation of cultural heritage and does

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<sup>179</sup> Rule 2 of the Annex Rules of the 2001 UNESCO Convention.

not further outline the conditions that must be met should commercial exploitation becomes an option.

### **(b) In Situ Preservation as First Option**

In situ preservation is the preferred way of protecting underwater cultural heritage as this means that objects are not lost and they can be studied and appreciated by future generations in its original environment and context. Chapter 3 shows how artefacts recovered from historic wrecks are divided between the government and salvor company. If the artefacts are split 50-50 between the two parties, half of the heritage is lost forever, as there is no guarantee that the artefacts in salvor's possession will be held in trust for public appreciation. In actual fact, not only 50% of the artefacts lost, but the split causes further losses to humankind since the site itself could have been damaged forever in the process and no further scientific investigations may be carried out on site.

### **(c) Guarantee of Public Access**

The new law is silent on the issue of public access to underwater cultural heritage, particularly since the new law provides for the establishment of protected zone. As will be shown in the next chapter,<sup>180</sup> there are a number of historic wrecks including several war wrecks of special interest to recreational divers particularly in the Sabah maritime area which need consideration when the new Act is implemented. By way of comparison, the Fisheries Act 1984 is also silent on the guarantee of access of to marine parks established pursuant to the Act as it simply provides for a set of rules and conditions relating to conduct of activities in the parks. Together, the Fisheries Act 1984 and the National Heritage Act 2005, have implications for the tourism industry have not been fully addressed under any of these laws.<sup>181</sup>

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<sup>180</sup> Chapter 5, para 5.7.3, pp. 239-246.

<sup>181</sup> Ibid.

**(d) The Minimum Standard for the Protection of UCH (vis-a-vis the 2001 UNESCO Convention Annex Rules)**

As discussed above,<sup>182</sup> the new law speaks very little regarding the in situ preservation of underwater cultural heritage but merely states that the relevant authority ‘may’ preserve the heritage in situ and further regulations have yet to be published on how survey and recovery activities are to be conducted. A new application form for the excavation or salvage of underwater cultural heritage has been published by the Department of Heritage pursuant to article 65 of the National Heritage Act 2005<sup>183</sup> and it would be interesting to note that this form is essentially an application for the excavation and salvage of underwater cultural heritage. The application form requires the applicant to furnish some important information relating to the project including:

- (i) Full information (CV) regarding the applicant and associated researchers who have experience in the field work of salvage and excavation of underwater cultural heritage
- (ii) Project proposal including objectives, methodology used, analysis, interpretation, techniques applied for excavation or salvage of underwater cultural heritage, conservation techniques as well as preservation program (if any), tools and references
- (iii) Written reports of previous survey works
- (iv) A copy of survey permit from the Department of Marine Malaysia
- (v) A list of institutions, agencies or companies which will participate with the applicant’s proposed work.<sup>184</sup>

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<sup>182</sup> P. 195.

<sup>183</sup> English version of the form is not available to be included as appendix. The original title is “Borang Permohonan Lesen Penggalian/Salvaj warisan Kebudayaan di Bawah Air.”

<sup>184</sup> Other information required in the forms are: (a) relevant details of the applicant; (b) details of the proposed ‘historic wreck’ (presumably to cover all other ‘UCH’ objects) such as name of the wreck, type, owners, length, weight, year or build, date of sinking and place of registration of the vessel; (c) information

Although the applicant is required to furnish all necessary information regarding salvage or excavation techniques and other preservation or conservation techniques, one is curious as to the standard benchmark applied by the relevant approving authority. As discussed in chapter 3, whether the project would actually turn into a full scale recovery project depends on the survey findings and the decision of the relevant authority regarding the viability of the project.<sup>185</sup> However, the application procedures set under the National Heritage Act 2005 as well as the Special Guidelines discussed in chapter 3,<sup>186</sup> are all essentially matters pertaining to 'recovery' or 'removal' of heritage objects and none giving indication to the application of in situ preservation as an objective in protecting the finite heritage.

#### **4.11 Conclusion**

##### **4.11.1 The Legal Position under the Antiquities Act 1976**

Legal developments at the International arena which culminated in the adoption of the UNESCO Convention 2001, and the rise of marine and underwater archaeology alongside the increase of commercial pursuits involving the discovery and excavation of historic wrecks of national interest in Malaysian maritime waters,<sup>187</sup> have paved the way for the need to review the adequacy of the legal mechanism provided under the now repealed Antiquities Act 1976. The most fundamental weakness within the legal framework prior to the National Heritage Act 2005, which came into force on 31 March 2006, was the absence of clear, specific and effective laws concerning underwater cultural heritage as part of the country's cultural heritage in need of protection. Even the term 'underwater cultural heritage' was nowhere to be found and never defined in

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on the cargos; (d) historical information on the vessel such as location of wreck, area, reasons for sinking and intended destination; (e) proposed scope of area for excavation and salvage; (f) duration; (g) declarations of the applicant and a licensing fee of RM250.

<sup>185</sup> Para 3.5.4, pp. 140-141.

<sup>186</sup> Chapter 3, para 3.5.3, pp. 131-137.

<sup>187</sup> Malaysia's territorial waters and exclusive economic zone. See; Chapter 3, pp. 134-137.



any Federal and State legislation. In the States' legislation, where at least the term 'cultural heritage' has been defined, that definition is fundamentally flawed in the sense that the intangible aspect of cultural heritage protection is completely ignored.

The absence of a clear and comprehensive definition of the term 'underwater cultural heritage' is not surprising since the term itself is of recent legal innovation. The Antiquities Act 1976 (West Malaysia), and the Antiquities and Treasure Troves Ordinance 1977 (Sabah), and the Antiquities Ordinance 1954 (Sarawak) were all enacted long before the definitive appearance of the term 'underwater cultural heritage' and long before the subject became a matter of grave interest in Malaysia. In addition, problems affecting underwater cultural heritage in Malaysia only began to surface or be seriously looked at in the early 1980s after reports of serious lootings of historic wrecks in the territorial waters off the coast of Peninsular Malaysia. The establishment of the National Committee for the Management of Historical Shipwrecks in Malaysia took place in 1988, many years since countries such as the United Kingdom and Australia enacted their own legislation to protect historic wrecks – a clear indication the late development of activities relating to the salvage of historic wrecks and underwater maritime archaeology.

Although the recognition of existence of properties located 'in seas, lakes and rivers' under the Antiquities Act 1976 could be interpreted as covering historic wrecks and underwater cultural heritage in general, the entire provisions throughout the relevant legislation are fundamentally lacking, and obviously not intended to cover, 'historic wrecks'. It is obvious that the Antiquities Act 1976 was designed to deal with terrestrial antiquities. Even if it did apply to underwater excavation activities, as they were meant for excavation activities only in inland water. Thus as observed above, there are no provisions for salvage permits of underwater cultural heritage or the creation of special zone to protect the heritage. In other words, there was an apparent lack of appreciation

of the special needs of underwater cultural heritage, as opposed to terrestrial cultural heritage, in terms of its protection measures. Federal and State legislation were all drafted with a view to protecting 'built' heritage even though there is the occasional reference to antiquities objects or monuments being found underwater.

The use of various terms which may imply cultural properties or cultural heritage like 'antiquities', 'historical monuments' and 'historical objects' under the Antiquities Act 1976 did not provide satisfactory coverage for the underwater cultural heritage. It is possible to argue that artefacts found together with the historic wrecks could be categorised as 'historical objects' of national cultural interest on the basis that the Antiquities Act 1976 recognised such objects in the 'bed of river, lakes or the sea', consequently rendering a general coverage for underwater cultural heritage. However, the difficulty in maintaining this position is that there is a profound lack of appreciation of the distinctive problems in managing underwater cultural heritage.

Just as scandalous is the lack of speed by the relevant government Ministry in addressing this issue. As far back as the 1980s, the seriousness of the need to protect underwater cultural heritage from unregulated and unscrupulous activities which caused irreparable damage has been brought to the knowledge of the relevant Ministries and Government departments. Yet, the Federal government seems to be content with only establishing a National Committee on the Management of Historical Shipwrecks; a Committee which was first established under the Ministry of Finance and later, in 1997, transferred to the Ministry of Arts, Culture and Heritage. Although the number of salvage activities approved are small due to lack of funding and lack of expertise in maritime archaeology. At least the results of the projects undertaken so far have resulted in the establishment of a semi-permanent museum on maritime heritage in Kuala Lumpur. The National Heritage Act 2005 is the result of the government's efforts in reviewing inadequacies in the then existing framework of laws surrounding

underwater cultural heritage. Inadequacies within the previous laws were resolved by way of replacing the old legislation with completely new legislation on cultural heritage - a stand-alone act designed to deal with a wide-ranging issues on cultural heritage from the terrestrial to the underwater, and from the tangible to the intangible.

#### **4.11.2 The Position under the National Heritage Act 2005**

Most of the problems relating to underwater cultural heritage have been addressed under the National Heritage Act 2005. It has done so by providing a clear definition the term 'underwater cultural heritage' and by providing a mechanism of control specially designed for this heritage. The Heritage Commissioner now takes over the duty of the Receiver of Wreck in keeping custody of historic wrecks. This is a good change as the Heritage Commissioner is the qualified person to be in possession of historic wrecks while the question of ownership of an unclaimed wreck is being resolved during the period of one year that is provided. It also means that all objects recovered during the excavation or salvage will vest in the Heritage Commissioner to avoid any such objects or artefacts from exchanging hands without going through the appropriate procedures. In the period of that one year period, anyone may come forward to establish his or her claim to any part of the underwater cultural heritage. Claimant is subject to pay any salvage fees or other costs involved. Where no claim is made, the Federal government takes ownership of the underwater cultural heritage. These regulations are reminiscent of the mechanism under the Merchant Shipping Ordinance 1952 in establishing question of ownership of wrecks and unclaimed wrecks.<sup>188</sup> It must be noted at this juncture, that the new Act does not, however, exclude the application of Merchant Shipping Ordinance 1952, which contains a set of rules designed principally to deal with commercial salvage operations. As far as salvage issues are concerned, the Merchant Shipping Ordinance 1952 is still applicable, subject of course that the salvage

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<sup>188</sup> This issue will be examined in the following chapter.

activity has been approved by the relevant authority. At the moment, the National Heritage Act 2005 merely provides that salvage or excavation must only be carried out if licensed to do so by the Heritage Commissioner. Further regulations relating to the conditions for salvage or excavation in implementing the provisions relating to underwater cultural heritage under the National Heritage Act 2005 are currently being considered by the Heritage Department. In addition, further regulations pertaining to the establishment of protected zones in sea areas involving underwater cultural heritage are also being drawn up by the relevant government department. Hence, it remains to be seen how the guidelines will operate. The probability is that similar regulations to those pertaining to the establishment of marine parks might be adopted with some modifications.

### Legislative Measures (Part II): Merchant Shipping Ordinance 1952 and Fisheries Act 1984

#### 5.1 Introduction

Salvage of historic wrecks no doubt represents a significant component of activities that have direct impact on underwater cultural heritage due to its very purpose and recovery method. Salvage activity is a recovery process that involves the physical removal of the cargoes of the wreck or of the wreck in question. In terms of salvaging a historic wreck, salvage activity is at the later stage of recovery process of bringing the wreck or parts of it to the surface. Salvage operations are also associated with other activities of discovering, surveying, and marking of the location of the shipwrecks concerned. Damage to underwater cultural heritage often results from unregulated and clandestine salvage operations.

However, there is also another group of activities, which could have an impact on the heritage and its associated environment. Such activities include leisure activities like scuba diving and video recording of the site for educational or documentary purposes. These activities do not necessarily cause destructive disturbance to the heritage site and often do not involve the removal of any objects from the site. In fact, if regulated properly, not only no harm caused to underwater cultural heritage and its associated environment, they will also make full sense of the 'first option' rule of the 'in situ preservation' as enunciated under the 2001 UNESCO Convention and its Annexed Rules.<sup>1</sup> Furthermore, recent advances in underwater technology have also

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<sup>1</sup> Ch. 2, para 2.5.2, pp. 94-96.

demonstrated that certain activities in deep sea could be conducted without causing destruction to the wrecks and the site, for example, through the use of 'remote operation vehicles' otherwise known as 'ROV'.<sup>2</sup> On the other hand, there is also another group of activities, which, although they do not involve the discovery and exploitation of underwater cultural heritage, they could nevertheless cause irreparable destruction to the heritage. An example of this is unregulated trawl net fishing in certain maritime waters that may accidentally destroy underwater cultural heritage.

The main objective of this Chapter is thus to identify and examine the relevant laws pertaining to these issues and to examine their application in regulating activities that have a bearing on the protection of underwater cultural heritage in Malaysia. Primarily, this chapter will study all relevant legal provisions, which govern salvage activities in general, under the Merchant Shipping Ordinance 1952, and their relevance underwater cultural heritage. Other legal provisions relating to the regulation of fishing activities and the protection and conservation of marine parks will also be examined.

## **5.2 Background Information to the Merchant Shipping Ordinance**

### **5.2.1 Introduction**

Salvage activities in Malaysia are governed by the application of the Merchant Shipping Ordinance 1952. As noted earlier,<sup>3</sup> Malaysia's maritime and shipping history goes a long way back to the heyday of the Malacca Sultanate evidenced amongst others by the ancient rules of the Malacca Maritime Code. The *Syahbandar* or the Harbourmaster was the authority responsible for the safety of navigation at sea and other related maritime affairs arising out of the implementation of the Code. Scrutiny of the Malacca Maritime

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<sup>2</sup> For discussion on legal status of ROV, see; Brown, E. D., and Gaskell, N. J. J., 'Report on the Law Relating to Autonomous Underwater Vehicles', Prelims of a Report Commissioned by the Southampton Oceanography Centre, Society for Underwater Technology, 1999. The report available at: [http://www.soc.soton.ac.uk/OED/gxg/Prelims.web\\_version.pdf](http://www.soc.soton.ac.uk/OED/gxg/Prelims.web_version.pdf).

<sup>3</sup> Chapter 4, para 4.1 – 4.1.4.

Code however shows nothing remotely resembling modern laws of salvage as applied in the Merchant Shipping Ordinance 1952. The Maritime Code itself was written well before the 15<sup>th</sup> century. The obvious conclusion is that salvage laws as understood today is relatively a legal development of the late 19<sup>th</sup> century. Despite the irrelevance of the Malacca Code in modern day context, it is interesting to note the distinct enunciation of the relationship between shipping practice and the prevailing laws of finds and of treasure trove during the Malacca Sultanate under the Code. The Code was drafted to deal with the discovery of treasures and it outlined the extent of the power of the ship *Nakhoda* (captain) but it did not go further dealing with the legal ramifications that follow an event that affects the vessel such as those governing 'wrecks and salvage' as provided under the Merchant Shipping Ordinance 1952. Today, the three Marine Departments, which are located in Peninsula Malaysia, Sabah and Sarawak, are the maritime entities responsible for the various aspects of maritime transportation system including overseeing activities relating to salvage. The exercise of their jurisdiction is by virtue of the Merchant Shipping Ordinance 1952, Sabah Merchant Shipping Ordinance and Sabah Merchant Shipping Ordinance respectively.<sup>4</sup> The implementation of these Ordinances is supported by the following sub-legislation, where applicable, over shipping activities within the territorial and internal waters of Malaysia. They are the Carriage of Goods by Sea Act 1950, Port Authorities Act 1963, Penang Port Commission 1955, Bintulu Port Authority Act 1981, Light Dues Board Act 1953, Ports Privatisation Act 1990 and the Domestic Shipping Licensing Board Regulation 1981.<sup>5</sup>

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<sup>4</sup> The legal provisions of these Ordinances are identical and for this reason this research will only refer to the Merchant Shipping Ordinance 1952 throughout.

<sup>5</sup> However, these acts and Regulations will not be examined in this thesis as their relevance are beyond the parameters of the present research objectives.



### 5.2.2 Regulation of Salvage Activities under the Merchant Shipping Ordinance 1952 vis-à-vis the National Heritage Act 2005

Matters pertaining to 'salvage and wrecks' lie within the jurisdiction of the Federal Government and the main legislation concerned is the Merchant Shipping Ordinance 1952. However, despite the Ordinance's obvious objective in providing rules and regulations pertaining to salvage operation,<sup>6</sup> it is not certain if the very principles underlying the Ordinance apply conveniently to the salvage of historical shipwrecks and underwater cultural heritage. Relying on the Merchant Shipping Ordinance alone could not effectively stop anyone from salvaging wrecks of historical nature in view of claiming reward for salvage services rendered. As discussed in previous chapter, prior to the National Heritage Act 2005, the Museums Department has generally relied upon section 2(1) of the Antiquities Act 1976, which simply defines 'antiquities' owned by the government to broadly include 'any object movable or immovable or any part of the soil or of the bed of a river or lake or of the sea...' With such broad latitude, the government effectively prohibits anyone from engaging in any activity directed at underwater cultural heritage in Malaysian waters without licence. The National Heritage Act 2005 thus attempts to remedy this situation by prohibiting clearly that 'no person shall carry any salvage or excavation work in any Malaysian waters for the purpose of finding any underwater cultural heritage, except with a licence approved by the Commissioner'.<sup>7</sup> However, one issue remains uncertain. The new law does not exclude the application of Merchant Shipping Ordinance 1952. Consequently, once the Heritage Council has approved projects involving salvage of historic wrecks,<sup>8</sup> the question arises whether such principles that govern salvage in general would also apply to the salvage of historic wrecks. Would the cardinal common law salvage principle such as 'no cure, no pay' principle be of any value in determining the value or

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<sup>6</sup> Preamble, MSO 1952.

<sup>7</sup> Sec. 65 of the National Heritage Act 2005.

<sup>8</sup> Headed by a Heritage Commissioner. Previously all projects will be considered and approved by the National Committee on the Management of Historic Wrecks.

the method of valuing historic wrecks which has been recovered? Can sunken shipwreck be considered a 'vessel in distress' thus qualifying for salvage services at all under the Merchant Shipping Ordinance? Do the provisions relating to wrecks and salvage under the Ordinance provide useful mechanism in dealing with underwater cultural heritage? This chapter will look at these issues and their interaction with the main provisions of the Merchant Shipping Ordinance 1952.

### 5.2.3 Application of English law of Salvage in Malaysia

Salvage laws as applied in Malaysia are the mirror image of the application of the salvage laws as applied in the United Kingdom,<sup>9</sup> mainly due to the similarity of legal provisions regarding 'wrecks and salvage' of the Merchant Shipping legislation in both countries. In addition, English cases are in principle of highly persuasive nature in the Malaysian courts and this has been a long held legal tradition. English cases on salvage have been applied by the Malaysian courts, although unfortunately, there is no instance of the application of English case laws involving historic wrecks in Malaysia. The rule permitting the application of English common law and equitable principles including salvage law in Malaysia is as laid out clearly in the Civil Law Act 1957 in the following terms:

'Save in so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the court shall –

- (a) In West Malaysia or any part thereof, apply the Common Law of England and the rules of Equity as administered in England on the 7<sup>th</sup> day of April 1956
- (b) In Sabah, apply the common law of England and the rules of equity, together with Statutes of general application, as administered or in force in England on the 1<sup>st</sup> day of December 1951
- (c) In Sarawak, apply the law of England and the rules of equity, together with statutes of general application, as administered or in force in England on the 12<sup>th</sup> day of December 1949

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<sup>9</sup> For discussion on the sources of English salvage law, see; Brice G., *Maritime Law of Salvage*, 1993, p. 6-7.

Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.<sup>10</sup>

It must be noted that the application of the English law principles is subject to local adaptation 'as the circumstances... permit' and 'subject to such qualification as local circumstances render necessary'. This limitation is necessary in view of the fact that Malaysia is 'a nation of diverse races practicing a variety of customs and religion' and a total importation of English law 'would be the imposition of a totally alien system on a society quite different from English society.'<sup>11</sup> In respect of the application of English law in commercial matters,<sup>12</sup> Section 5 of the Civil Law Act 1956, which had its origin the section 6(1) of the Straits Settlement Civil Law Ordinance 1878,<sup>13</sup> provides that:

1) In all questions or issues which arise or which have to be decided in the States of West Malaysia other than Malacca and Penang with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, *the law to be administered shall be the same as would be administered in England* in the like case at the date of the coming into force of this Act, if such question or issue has arisen or had to be decided in England, *unless in any case other provision is or shall be made by any written law.* (Emphasis added)

(2) In all questions or issues which arise or which have to be decided in the States of Malacca, Penang, Sabah and Sarawak with respect to the law concerning any of the matters referred to in subsection (1), *the law to*

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<sup>10</sup> Section 3(1) of the Civil Law Act 1956.

<sup>11</sup> Wu Min Aun, *An Introduction to the Malaysian Legal System*, 2<sup>nd</sup> ed., 1978, pp. 18-21.

<sup>12</sup> See generally, Wu Min Aun, above, pp.21-24, and Sharifah Suhana Ahmad, *Malaysian Legal System*, 1999, pp. 130-133.

<sup>13</sup> In all questions or issues which arise or which have to be decided in respect to the law of partnership, corporations, bank and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the corresponding period if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by statute.

*be administered shall be the same as would be administered in England, in the like case at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law.* (Emphasis added)

Concisely, English law in relation to issues of carriers by air, land, sea, marine insurance, average will be generally be applied by the Malaysian courts 'unless in cases where provision has been made by other written law.' The Merchant Shipping Ordinance 1952 carries the English legal influence on shipping matters as per the Merchant Shipping Act 1894, which has now been replaced by the Merchant Shipping Ordinance 1995. All relevant sections under the 'Wreck and Salvage' chapter in the Merchant Shipping Ordinance 1952 are of substantial similarity with those provided in the English statute. One glaring difference is that the UK Merchant Shipping Act 1894 has been updated, in particular, to incorporate the International Salvage Convention 1989 of which the UK is a party to. Whereas Malaysia retains the old version and it continues to be applied throughout the Federation. The legal provisions on Salvage and Wrecks (Part X) between the UK 1894 Act and the UK 1995 Act are nonetheless similar. It is not clear why Malaysia is not a party to the Salvage Convention 1989. Today, the Convention only has about less than a score of members.<sup>14</sup> Perhaps this is an issue that the government should consider in the nearest future especially in view of the growth of Malaysian shipping ports in the region that could possibly result in the growth of salvage industries too. The 1989 Salvage Convention is of particular significance in that it was carefully drafted mindful of the special need of underwater cultural heritage – it accords a signatory State the right not to apply the provisions of the Convention to 'maritime cultural property of prehistoric, archaeological, or historical interest.'<sup>15</sup>

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<sup>14</sup> <http://www.imo.org>.

<sup>15</sup> Art. 30(1) of the Salvage Convention 1989. Chapter 1, para 1.4.4.

#### 5.2.4 Admiralty Jurisdiction of the High Court

Prior to the Merchant Shipping Ordinance 1952 and the establishment of the Federal Council (for the Federated Malay States) in 1909, the Courts of Senior Magistrate in the States of Selangor, Pahang, Perak and Negeri Sembilan, have the jurisdiction to 'try all suits relating to wrecks, collisions, the capture of prizes, claims for salvage, towage, breaches of contract and all other maritime matters arising within the waters of the State, or in respect of which the defendant or defendants or any of them resides or has a place of business within the State.' These were the Enactment No. 3 (1900) of the State of Selangor, Enactment No. VIII (1900) of the State of Pahang, Enactment No. XIV (1900) of the State of Negri Sembilan and Enactment No. V of the State of Perak. However, these enactments only provided for Court jurisdiction in such cases and they did not contain any specific provisions for the salvage of wrecks. These Enactments do not warrant further discussion here as they have long since been disused with the dismantling of the segregation between the then Malay States. When the Merchant Shipping Ordinance 1952 came into force, matters pertaining to salvage of wrecks come under the jurisdiction of the High Court and this applies throughout the Federation.<sup>16</sup> The relevant law now reads:

Subject to this Ordinance and any Imperial Act in force in the Federation or any part thereof, the High Court shall have jurisdiction to decide upon all claims whatsoever relating to salvage, whether the services in respect of which salvage is claimed were performed on the high seas or within the Federation, or partly on the high seas and partly within the Federation, and whether the wreck in respect of which salvage is claimed is found on the sea or on the land or partly on the sea and partly on the land.<sup>17</sup>

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<sup>16</sup> High Court for Peninsular Malaysia, the States of Sabah and Sarawak have their own High Courts of equal standing.

<sup>17</sup> Section 403 of the Merchant Shipping Ordinance 1952.

The Admiralty jurisdiction of the Malaysian High Court is thus largely governed by statute. Section 24(b) The Courts of Judicature Act 1964 provides that the High Court shall have 'the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of Justice in England under the United Kingdom Supreme Court Act 1981'. This effectively renders the said UK Act as the governing law applicable in matters pertaining to admiralty in Malaysia.<sup>18</sup> Notwithstanding this however, the parties do not need to invoke admiralty jurisdiction of High Court since they can file their cases in the Sessions or Magistrates courts which also have the jurisdiction over some offences under the Merchant Shipping Ordinance 1952 and other Regulations.<sup>19</sup> Section 24(b) of the Courts of Judicature Act 1964 has been amended twice. The first amendment was made to confer the High court 'the same jurisdiction and authority in relation to matters of admiralty as is for the time being exercisable by the High Court of Justice in England.'<sup>20</sup> This was later thought to be problematic as the wording of the proviso invites 'unsolicited changes, whether by way of addition or abatement, in admiralty jurisdiction which are introduced in England.'<sup>21</sup> The second amendment was made to confer the High Court 'the same admiralty jurisdiction as is had by the High Court of justice in England' under a specific piece of legislation, namely the UK Supreme Court Act 1981.

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<sup>18</sup> See: *Kawasaki Kisen Kaisha Ltd. v. Owners of the Ship or Vessel 'Able Lieutenant'* [2002] 7 CLJ 478 and more recently in *Wei Hsing Food (S) Pte Ltd v. The Owners or Demise Charterers of the Ship or Vessel 'The Neptune' & Anor* [2005] 3 CLJ 654 where the Court held 'section 24(b) CJA empowers our Courts to apply the provisions of the UK Supreme Court Act 1981 in the same manner as an English Court would do when determining an admiralty matter under the Act.

<sup>19</sup> Mainly section 252 of the Merchant Shipping (Collision Regulations) Order 1984 PU(A) 438/84 and section 492 of the Merchant Shipping Ordinance 1952.

<sup>20</sup> See section 5 of the Courts of Judicature (amendment) (No. 2) (1984).

<sup>21</sup> Toh Kian Sing, *Admiralty Law & Practice*, Butterworths, Singapore, 1998, p. 12.

## 5.3 Salvage of Wrecks

### 5.3.1 Defining Salvage

The Merchant Shipping Ordinance 1952 simply defines 'salvage' as 'all expenses properly incurred by the salvor in the performance of salvage services.'<sup>22</sup> There are four basic requirements that the Court will consider in determining a successful salvage reward; the existence of 'maritime property', 'voluntary' act of salvage, there must be element of 'danger' and the salvage operation itself must be 'successful'.<sup>23</sup> One commentator added a fifth to the requirements in that 'the salvage must occur where salvage law applies.'<sup>24</sup> This Chapter explains these requirements and seeks to examine their relevance in relation specifically to the salvage of historic wrecks or underwater cultural heritage.

### 5.3.2 Historic Wreck as Salvable Maritime Property

The term 'property' presumes the existence of ownership and it is a cardinal principle of salvage law that only 'maritime property' may be salvaged. The landmark English case pronouncing this principle is the *Gas Float Whitton (No. 2)*<sup>25</sup> where the Court held that only 'ship, her apparel and cargo... and the wreck of these' can be salvaged thereby effectively excluding other marine related properties like 'an unmanned lightship' for the purpose of salvage reward.<sup>26</sup> However, modern day development has also resulted in the need to extend the coverage to other non-traditional maritime subject such as an

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<sup>22</sup> Section 366 of the Merchant Shipping Ordinance 1952.

<sup>23</sup> See generally, Brice on Maritime Law of Salvage, above, note. 9, Tetley, below, note. 24, and Meeson, below, note. 24.

<sup>24</sup> Meeson, N., *Admiralty Law and Practice*, 2<sup>nd</sup> Ed., 2000, para 2-079 and 2-087; see also, Tetley, W., *International Maritime and Admiralty Law*, 2002, p. 328 – 334.

<sup>25</sup> [1897] AC 337.

<sup>26</sup> See sec. 742 of the UK Merchant Shipping Act 1894 and now sec. 313 of the UK Merchant Shipping Act 1995.



aircraft. In Malaysia, this extension is given effect vide section 23(1) of the Civil Aviation Act 1969,<sup>27</sup> which provides:

Any services rendered in assisting or in saving life from, or in saving the cargo or apparel of, an aircraft in, on or over the sea or any tidal water, or on or over the shores of the sea or any tidal water, shall be deemed to be salvage services in all cases in which they would have been salvage services if they had been rendered in relation to a vessel; and, where salvage services are rendered by an aircraft to any property or person, the owner of the aircraft shall be entitled to the same reward for those services as he would have been entitled to if the aircraft had been a vessel.

A 'ship in distress', 'vessel in distress' or 'wreck', are typically employed to cover the subject matter of salvage. The Merchant Shipping Ordinance 1952 simply defines 'wreck' to include 'jetsam, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water.'<sup>28</sup> This definition is identical with the definition of 'wreck' adopted under the UK Merchant Shipping Act 1995.<sup>29</sup> None of these terms (jetsam, flotsam, lagan and derelict) were given any statutory interpretation under the Ordinance although some interpretation has been developed through case laws.<sup>30</sup> Particularly significant in relation to historic wrecks is the inclusion of the term

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<sup>27</sup> Similar legislation in UK is the Civil Aviation Act 1982. See in particular section 87(1).

<sup>28</sup> Section 1 of the *Merchant Shipping Ordinance 1952*.

<sup>29</sup> This definition is similar to the meaning of 'wreck' under sec. 510 of the UK Merchant Shipping Act 1894, which was retained in the Merchant Shipping Act 1995.

<sup>30</sup> See; *Sir Henry's Constable's Case* (1601) 5 C. Rep. 106a; *The King (in His Office of Admiralty) v. Property Derelict* (1825) 3 Hag. Adm. 228; *The King (in His Office of Admiralty) v. Forty-Nine Casks of Brandy* (1836) 3 Hag. Adm. 270; *R. v. Two Casks of Tallow* (1837) 3 Hag. Adm. 294; *the Pauline*, 2 Rob. Ad. R. 359; and *the Gas Float Whitton No. 2* [1896], p. 42. See also; Phillips, N., *Merchant Shipping Act 1995*, p. 182, f.n. 3. In the widely cited *Att. Gen v. Sir Henry Constable* (1601) 5 Co. Rep. 106 and *Cargo ex Schiller* (1887) 2 P.D. 145, the terms 'flotsam, jetsam and lagan' were interpreted as 'Flotsam, is when a ship is sunk or otherwise perished, and the goods float on the sea. Jetsam, is when the ship is in danger of being sunk, and to lighten the ship the goods are cast into sea, and afterwards, notwithstanding, the ship perishes. Lagan (*vel potius* ligan) is when the goods which are so cast into the sea, and afterwards the ship perishes, and such goods cast are so heavy that they sink to the bottom, and the mariners, to the intent to have them again, tie to them a buoy or cork, or such other thing that will not sink, so that they may find them again.'

‘derelict’ as a salvable property. The Merchant Shipping Ordinance 1952 does not define this term.<sup>31</sup> According to Brice, ‘derelict’ means ‘a ship which is abandoned and deserted at sea by her Master and crew without any intention on their part of returning to her but does not include a vessel which is left by her master and crew temporarily with the distinct intention of returning to it.’<sup>32</sup>

Thus, a constituting element of ‘derelict’ is the occurrence and the effect of ‘abandonment’ itself. For practical purposes, abandonment could be either express or constructive, and this means that such abandonment does not have to be effected through a formal order of abandonment.<sup>33</sup> The test to be applied in ascertaining the existence of ‘abandonment’ is ‘the intention and expectation of the master and crew at the time of quitting her’.<sup>34</sup> Thus, abandonment is not proven by showing the manner in which the physical act of ‘abandonment’ took place, but by examining the actual effect of that abandonment, or the *animus quo* of such abandonment in a particular case. In *Bradley v Newson*,<sup>35</sup> the court asked, was the ship ‘a derelict in the legal sense of the term; or, in other words, had the master and crew abandoned her without any intention of returning to her, and without hope of recovery?’<sup>36</sup> It is on this point that Brice spoke of the various contexts in which abandonment could take place as a necessary consideration for the determination of a successful salvage of ‘derelict’ as a salvable property; whether there was abandonment of ‘ownership’ or of ‘possession’ and

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<sup>31</sup> The term is also not defined in the UK Merchant Shipping Act but definition has been developed through case laws. See; *The Aquila* (1798) 1 C. Rob. 37; *The Sophie* (1841) 6 L. T. 370; *The Zeta* (1875) L.R. 4. See; Phillips, N., *Merchant Shipping Act 1995*, p. 182, f.n. 4.

<sup>32</sup> Brice, above, p. 223, citing *Cossmann v. West and British America Assurance Company* (1887) 30 App. Cas. 160, 180. See also *Simon v Taylor* on derelict. The Oxford Companion to Law, p. 352, simply defines ‘derelict’ as ‘a thing abandoned, particularly a ship abandoned on the high seas, if salvaged, it belongs to the owner, unless he has abandoned it to the underwriters, but salvage reward is payable.’

<sup>33</sup> Ibid, citing *The Albion* (1941) P 99, p. 112. See also *Simon v. Taylor* as noted above.

<sup>34</sup> Halsbury’s, p. 722, para 1092 and see; *Bradley v Newson*, below.

<sup>35</sup> Cited in *Simon v Taylor*, below.

<sup>36</sup> Similarly one may ask, was the ship captured and the crew merely trying to save their lives?

whether the abandonment was 'temporary' or 'permanent' in nature.<sup>37</sup> Although the Merchant Shipping Ordinance 1952 does not define this legal concept and the various contexts it could occur, it is submitted that the term 'derelict' for the purpose of the Ordinance has to mean physical abandonment as opposed to abandonment in view of divesting ownership. Such position is implied from the relevant legal provision that allocates a certain period of time within which timeframe the owner of the wrecks should appear to make his claim.<sup>38</sup>

In the neighbouring Singapore, the High Court in *Simon v. Tailor* held that 'when the U 859 was torpedoed by the British submarine there was no abandonment by the commander and crew of the U 859 to make it *res derelicta* as the commander and crew did not form or had the intention to abandon the submarine.'<sup>39</sup> The Court referred to Halsbury's law of England's in defining derelict.<sup>40</sup> The Court went on to refer to the judgement of Lord Findlay LC in *Bradley v. Newson* where the Court held that: 'The fact that the vessel is a derelict does not involve necessarily the loss of the owner's property in it, but any salvors by whom such a vessel is picked up have the right to possession and control.'<sup>41</sup> The Lordship went on:

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<sup>37</sup> Brice, above, p. 284.

<sup>38</sup> See below, para 5.4.3.

<sup>39</sup> (1975) 1 MLJ 236, at p. 240.

<sup>40</sup> At p. 722, para 1092: 'property, whether vessel or cargo abandoned at sea by those in charge of it without hope on their part of recovering or intention of returning to it. A vessel is not derelict which is only left temporarily by her master and crew with the intention of returning to her even though the management of the vessel may have passed into the hands of salvors. On the other hand, a vessel deserted by her master and crew with the intention of abandoning her does not cease to be derelict because they subsequently change their intention and try to recover her. Whenever the question arises whether a vessel is derelict or not, the test to be applied is the intention and expectation of the master and crew at the time of quitting her, and, in the absence of direct evidence, that is determined by consideration of all the circumstances of the case.'

<sup>41</sup> *Bradley v. Newson* (1919) AC 16; 14 Asp Mar Law 340, at 343.

The crucial question is this. Was this vessel when she was picked up by salvors a derelict in the legal sense of the term; or, in other words, had the master and crew abandoned her without any intention of returning to her, and without hope of recovery? It appears to me to be quite impossible to answer this question in the affirmative. In quitting the vessel the master and crew simply yielded to force. There was no voluntary act on their part, and the case stands exactly as it would have done if they had been carried off the vessel by physical violence on the part of the crew of the German submarine. It would be extravagant to impute to them the intention of leaving the ship finally and for good. They simply bowed to the pressure of irresistible physical force. If a British destroyer had appeared on the scene, and had driven off or sunk the submarine, they would gladly have returned to their vessel. All they intended was to save their lives by obeying the orders of the German captain ... The physical act of leaving the vessel is only one feature in such a case. Another and essential feature, in order to make it a case of derelict, is the state of mind of the captain and crew when they left. The question *quo animo* is decisive, and the facts seem to me to show clearly that the quitting of the ship was not under such circumstances as to make it a case of derelict.

In relation to underwater cultural heritage, the requirement for 'abandonment' seems only necessary in relation to salvage of wrecks other than historic wrecks as the rights of a salvor in relation to his salvage services will only be an issue if the services were licensed.<sup>42</sup> In addition, the terms 'flotsam, jetsam, lagan and derelict' have been employed in relation to 'wrecks' generically and there is no distinction to be found between a historical shipwrecks and other type of wrecks under the Ordinance. The main objective of the Ordinance, same as the UK Merchant Shipping Act 1894's objective, is 'primarily concerned with the safe keeping and disposal of property from vessels in distressed or recently wrecked and not from vessels which had been lying on the seabed for a considerable period of time.'<sup>43</sup> The Merchant Shipping Ordinance is not intended to deal with historic wrecks, and therefore falls short in addressing issues

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<sup>42</sup> See above, art. 65 of the National Heritage Act 2005.

<sup>43</sup> Dromgoole, S., *Protection of historic wrecks in UK Part I*, (1989) 4 INT'L J. ESTUARINE & COASTAL L., p. 27.

relating to underwater cultural heritage as well. The intention of the legislator for such a general connotation of the term 'wreck' can be seen from the wordings of the provisions of the Ordinance itself. In addition, the age requirement of 'historical or archaeological objects' as provided under the repealed Antiquities Act 1976 or the new Heritage Act is irrelevant in determining what constitutes a 'wreck' under the Ordinance. Consequently, because the Ordinance applies to 'wrecks' in general, regardless of its nature or the historical significance of the wrecks concerned, all wrecks found within the jurisdiction of the Federation, or brought within the jurisdiction of the Federation, would become the subject of governance of the Ordinance. Although the recently announced National Heritage Act 2005 already contains some provisions regulating the management of underwater cultural heritage, it does not expressly exclude the application of the Ordinance. Therefore, the relationship between the Ordinance and the National Heritage Act 2005 in providing the necessary control mechanism over activities affecting the salvage of historic wrecks and underwater cultural heritage needs further scrutiny.

### 5.3.3 Requirement of Danger

Another cardinal salvage law principle is that in order to constitute a successful salvage, the salvable subject itself must be in danger, or more popularly termed as vessel in distress or a vessel threatened by marine peril. The *raison d'être* of the development of salvage law itself is in the idea of preventing further damage or loss to the property concerned.<sup>44</sup> Kennedy stated that such factors relevant for the determination of requirement of danger as follows;

the lesser ability of a disabled vessel to deal with emergencies such as fire or being set adrift; the danger of deterioration of ship and cargo (especially

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<sup>44</sup> See *The Cythera* [1965] 2 Lloyd's Rep. 454, *The Glaucus* [1948] 81 Ll. L. Rep. 262, *The Troilus* [1951] 1 Lloyd's Rep. 467, *The Goring* [1986] 1 Lloyd's Rep. 127 which was later affirmed by the House of Lords [1988] 1 Lloyd's rep. 397, *The Aldora* [1975] QB 748, *The Geertje K* [1971] 1 Lloyd's Rep 285.

if perishable) if not removed; the facility for repairs at the place in question; the possibility of safely discharging and storing the cargo and sending it on to its destination; the possibility of expenses and the effect of delay upon both ship and cargo; and the possibility of repair at convenient ports and the time involved and safety of the operation to ship and cargo.<sup>45</sup>

The question that has often been asked is whether a historic wreck is a vessel in danger for the purpose of salvage reward. The element of danger is necessary to demonstrate the necessity of saving a ship in distress as an equitable principle justifying for the salvage reward. One side of the argument is that historic wrecks have sunk to the bottom of the ocean for many years and that the element of danger had ceased to exist. On the other hand, the danger could be said to continue to survive in a different context – that the ‘danger’ of the wreck being a navigational hazard especially when the wrecks are located within shipping route. In terms of protecting underwater cultural heritage, historic wrecks need to be saved from the elements and ultimately from the danger of being plundered by treasure hunters. Unfortunately, it is not within the purview of the Merchant Shipping Ordinance and definitely not within the remit of the traditional salvage law principles to deal with this sort of issues. Thus, the peril that is likely to occur is when the salvors remove objects from the wrecks site and fail to adequately conserve them by following universally accepted archaeological standard such as those under the ICOMOS Charter and the Annex Rules of the 2001 UNESCO Convention. In part, this issue has been addressed by the National Heritage Act 2005 by making it an offence for anyone to carry any salvage work without licence subject to the conditions specified by the Heritage Commissioner.

#### **5.3.4 Voluntariness of the Act**

Although the performance of salvage services must be based on voluntary act on the part of the salvor, it does not follow that the salvor is precluded from performing the

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<sup>45</sup> Kennedy, *Law of Salvage*, 15<sup>th</sup> Ed., 1985, Stevens, London, p. 339.

services out of contract. In shipping practice, this usually arises out of the Lloyd's Standard Form of Salvage Agreement. However, if there is already 'a duty to render the service wholly and completely' on the part of the claimant and 'that duty was owed to the owners of the property saved', the claim for salvage must fail, unless the claimant can prove that 'the services rendered are outside or beyond the scope and bounds of their duties under contract'.<sup>46</sup> The prevailing scenario in Malaysia is that it is up to a prospective salvor to propose a certain project to the government through the Heritage Commissioner, who will forward the application to the National Committee of the Management of Historic Wrecks if the project is viable. It is also up to the government to consider the proposal and to proceed from there. Alternatively, it is the government who will commission any institution or salvage company to carry out a salvage project.

### 5.3.5 Successful Salvage

Salvage operation too must be successful, at least partially, before a salvage claim can be made. The reason is that salvage law has always been associated with the principle of 'no cure, no pay'.<sup>47</sup> The principle of 'no cure, no pay' has also been incorporated into most of the Salvage contracts between the government of Malaysia and private companies intending to carry out salvage of historic wrecks.<sup>48</sup> Proposed projects involving the recovery of underwater cultural heritage contain elements of risk, and it is precisely on this reason that many projects which have been approved by the government did not proceed further.

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<sup>46</sup> Hill, C., *Maritime Law*, 6<sup>th</sup> Ed., 2003, LLP, p. 337, also citing *The Sandefford* [1953] 2 Lloyd's Re. 557 where the Court held that the services rendered by the Pilot as 'salvage' services because 'not only did the Pilot take a personal risk' thus risking his own 'personal reputation... but also he relieved the ship's owners of the almost certain alternative of a vast salvage award for tug assistance' and that 'the underlying reason for salvage awards is to encourage seafaring people to take reasonable risks for the purpose of saving maritime property in danger'. See also; *The San Demetrio* (1941) 69 Ll. L. Rep. 5, *The Warrior* (1862) Lush 476, *The beaver* (1800) 3 Ch Rob 92, *The Albion* (1941) 70 Ll. L. rep. 257.

<sup>47</sup> See; *The Rene* [1955] 1 Lloyd's Rep. 101.

<sup>48</sup> Interview with Mr. Khairuddin of the Department of Museum and Antiquity, April 2004. See salvage guidelines, chapter 3.



### 5.3.6 Salvor and Salvage Services

The term 'salvor' is nowhere defined in the Merchant Shipping Ordinance 1952 but from the meaning of the term 'salvage' it can be safely concluded that a salvor is the person who voluntarily performed a successful salvage services.<sup>49</sup> Anyone can become a salvor except those who are already contractually bound to perform his duties. In Malaysia, the performance of salvage can also come from salvors from a state owned vessel.<sup>50</sup> Sec. 173(1) of the Armed Forces Act 1972<sup>51</sup> provides that 'where salvage services are rendered by or with the aid of a ship or aircraft belonging to the Yang Di-Pertuan Agong and used in the armed forces, the Federal government may claim salvage for those services, and shall have the same rights and remedies in respect of those services as any other salvor would have had if the ship or aircraft would have belonged to him'. In the case of *Hans L Simon v Geoffrey John Taylor & Ors* (1975),<sup>52</sup> in determining whether the Defendants i.e. the four divers in the case are in fact salvors for the purpose of salvage rewards, the Court considered the term 'salvage' by referring to Halsbury's Laws of England.<sup>53</sup> Relevant part of the Halsbury's laws text defining the term salvage reads:

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<sup>49</sup> Sec. 255 of the UK Merchant Shipping Act 1995 defines 'salvor' as 'in the case of salvage services rendered by the officers or crew or part of the crew of any ship belonging to Her Majesty, the person in command of the ship'.

<sup>50</sup> Sec. 173(1) of the Armed Forces Act 1972<sup>50</sup> provides that 'where salvage services are rendered by or with the aid of a ship or aircraft belonging to the Yang Di-Pertuan Agong and used in the armed forces, the Federal government may claim salvage for those services, and shall have the same rights and remedies in respect of those services as any other salvor would have had if the ship or aircraft would have belonged to him' Section 173(2) further provides that 'no claim for salvage services by the commander or any of the officers... of a ship or aircraft belonging to... the Yang di-Pertuan Agong... shall ne finally adjudicated upon, unless the consent of the Minister to the prosecution of the claim is proved...'

<sup>51</sup> Act No. 77.

<sup>52</sup> (1975) 1 MLJ 236, at p. 240.

<sup>53</sup> Vol. 35 at p. 731 para 1109.

...either the service rendered by a salvor or the reward payable to him for his service. Salvage service in the present sense is that service which saves or contributes to the safety of a vessel, her apparel, cargo, or wreck, or to the lives of persons belonging to a vessel when in danger at sea, or in tidal waters, or on the shore of the sea or tidal waters, provided that the service is rendered voluntarily and not in the performance of any legal or official duty or merely in the interests of self-preservation. The person who renders the service, that is the salvor, becomes entitled to remuneration termed 'salvage reward.'<sup>54</sup>

Based on this definition, the Court held that the 'the essence of a salvage service is that it is a service rendered to property or life in danger and the burden of proving the presence of danger rests upon those who claim as salvors.'<sup>55</sup> In this case, some mercury were recovered from a German submarine U859 which sank during World War II in 1944 25 miles off the Island of Penang, Malaysia, and was brought into Singapore. Earlier to that in 1969 there was an agreement entered into between the company Associated Salvage Sendirian Berhad (ASSB) and the Government of Malaysia whereby ASSB 'purchased' the interest of the Government of Malaysia in this sunken submarine. At this point of time, the identity of the vessel could not be identified but when its identity was later ascertained, the Federal Republic of Germany claimed the sunken vessel. The question was whether the Defendants were to be regarded as salvors for the purpose of salvage services. In this case the Court held that the Defendants were not salvors since what their actions were not motivated 'by any intention to save for the benefit of the owners of the submarine and the cargo but solely for their own benefit and in other words, they cannot be said to have rendered 'any service in the nature of salvage services.'<sup>56</sup> In rejecting the Defendants claim that the 'raising of a sunken vessel or cargo' as a salvage service, the Court decided that the attitude of the four diver are

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<sup>54</sup> Ibid.

<sup>55</sup> See also Halsbury's p. 738 para 1119.

<sup>56</sup> Simon (1975), above, p. 240.

such 'they thought they had every right to take the cargo from the submarine because the submarine was in International waters and that anyone finding it could take it.'<sup>57</sup>

#### **5.4 The Role of the Receiver of Wreck**

##### **5.4.1 The Principal Receiver**

The Director Marine of the Marine Department is the Principal Receiver of Wreck for the whole of the Federation including the States of Sabah and Sarawak.<sup>58</sup> He is generally responsible for the 'direction and supervision over all matters relating to wreck and salvage'<sup>59</sup> as specified under the Merchant Shipping Ordinance.<sup>60</sup> There is also a network of Receivers based throughout the Federation,<sup>61</sup> usually based in District areas around the coast, to assist the Principal Receiver in carrying out his duties. The following section lists out the duties of the receivers of wrecks according to the Merchant Shipping Ordinance 1952. The main role played by the Receivers in relation to historic wrecks in Malaysia is on the reporting mechanism, educational aspects and cooperation with other organisations. The Ordinance provides for the implementation of duties of the Receiver in relation to vessels in distress or wrecked or stranded vessels as well as their powers in dealing with wrecks.

##### **5.4.2 Duties of the Receivers over Wrecked, Stranded or Vessel in Distress**

One of the most basic and important duties of the Receivers under the Ordinance is for the performance of such measures in relation to the preservation of wrecked, stranded or distress vessel 'at any place on or near coasts of the Federation or any tidal water within the limits of the Federation'.<sup>62</sup> Such measures include in getting 'acquainted with

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<sup>57</sup> Ibid.

<sup>58</sup> Sec. 367(1) of the Merchant Shipping Ordinance 1952. See website info at [www.marine.gov.my](http://www.marine.gov.my).

<sup>59</sup> Section 367(2) of the Merchant Shipping ordinance 1952.

<sup>60</sup> Generally; sections 367 – 401, Ibid.

<sup>61</sup> All receivers are appointed by the Ministry of Transport ([Http://www.mot.gov.my](http://www.mot.gov.my)) and see; section 367(3) of the Ordinance.

<sup>62</sup> Sec. 368(1) of Merchant Shipping Ordinance.

the circumstances' relating to the wreckage, immediate presence in the area concerned, and the act of taking 'command of all persons present'.<sup>63</sup> In so doing, the Receiver 'shall assign such duties and give such directions to each person as he thinks fit for the preservation of the vessel and of the lives of the persons belonging to the vessel... and of the cargo and apparel of the vessel.'<sup>64</sup>

'(2) Any person, who wilfully disobeys the direction of the receiver, shall be liable for each offence to a fine not exceeding five hundred dollars, but the receiver shall not interfere between the master and the crew of the vessel in reference to the management thereof unless he is requested to do so by the master.'<sup>65</sup>

In addition to that, the Receiver is also responsible to take the following measures:

- (1) With a view to such preservation as aforesaid of the shipwrecked persons or of the vessels, cargo or apparel:
  - (a) Require such persons as he thinks necessary to assist him;
  - (b) Require the master or other person having the charge of any vessel near at hand to give such aid with his men or vessel as is in his power;
  - (c) Demand the use of any vehicle or any draught animal that may be near at hand.
- (2) Any person who refuses without reasonable cause to comply with any such requisition or demand shall be liable for each refusal to a fine not exceeding one thousand dollars.'<sup>66</sup>

Since the Ordinance was not designed to cater for archaeological concerns over the conservation of historic wrecks, the ability of the Receiver to decide on questions relating to the archaeological findings whilst in custody of the object is questionable. The Ordinance does not clearly establish the relationship between the Receiver of Wreck and the Director-General of the Museums Department or even the recently appointed Heritage Commissioner. However, it is submitted that, the duty on the part

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<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Sec. 368(2), Ibid.

<sup>66</sup> Sec. 369, Ibid.

of the Receiver to 'require such persons as he thinks necessary to assist him' could be interpreted as including the Director-General of the Museum. The role of the Receiver of Wreck as the custodian of an underwater cultural heritage after salvage is now passed on to the Heritage Commissioner by virtue of the National Heritage Act 2005.

#### **5.4.3 Reporting Mechanism**

One significant feature of the Merchant Shipping Ordinance in ensuring the effective implementation of role of the Receiver in relation to any finding of historic wreck is the creation of the duty on the part of the salvor or the finder to communicate with and give due notice to the Receiver of such findings. Section 374 of the Ordinance outlines the terms for the communication of the discovery of wrecks and the subsequent act of taking possession thereof by the Receiver of Wreck in the following terms:

- (1) Where any person finds or takes possession of any wreck within the limits of the Federation or of any wreck found or taken possession of outside the limits of the Federation and brought within the limits of the Federation, he shall -
  - (a) if he is the owner thereof, give notice to the receiver of the district stating that he has found or taken possession of the same, and describing the marks by which the same may be recognised;
  - (b) if he is not the owner thereof, as soon as possible deliver the same to the receiver of the district.
- (2) Any person who fails, without reasonable cause, to comply with this section, shall be liable for such offence to a fine not exceeding one thousand dollars, and shall in addition, if he is not the owner, forfeit any claim in salvage, and shall be liable to pay to the owner of the wreck if it is claimed, or if it is unclaimed to the person entitled to the same, double the value thereof, to be recovered in the same way as a fine of a like amount under this Ordinance.

The failure on the part of the person who takes possession of the wreck to comply with the terms of this provision means a wrongful attempt to be in possession of the said wreck in view of defrauding or depriving the real owners from their rights or title to

the wrecks.<sup>67</sup> The Receiver will be in custody of the wreck for a period of up to one year and his custody will take effect 'from the time at which the wreck came into possession of the Receiver'.<sup>68</sup> The period will also be the maximum timeframe within which any owner to appear to prove ownership of the said wreck 'to the satisfaction of the Receiver' subject to any 'salvage fees and expenses due' in relation to the wreck before he is 'entitled to have the wreck or the proceeds thereof delivered up to him'.<sup>69</sup>

In the event that the Receiver takes possession of the wreck, 'he shall within forty-eight hours cause to be posted in any Port Office within the district where the wreck was found or was seized by him, and, if he thinks it desirable, he shall send to the Secretary of Lloyd's in London, a description thereof and of any marks by which it is distinguished'.<sup>70</sup> In addition;

Where any wreck or any articles belonging to or forming part of a foreign ship which has been wrecked on or near the coasts of the Federation, or belonging to and forming part of the cargo, are found on or near those coasts or are brought into any port in the Federation, the consular officer of the country to which the ship, or, in the case of cargo, to which the owners of the cargo may have belonged shall, in the absence of the owner and of the master or other agent of the owner, be deemed to be the agent of the owner, so far as relates to the custody and disposal of the wreck or such articles.<sup>71</sup>

If for any reason, no owner comes forward to establish 'a claim to any wreck found in the Federation, or to any wreck found or taken possession of outside the Federation and brought within the Federation and in the possession of a receiver', the Receiver shall

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<sup>67</sup> This is based on a similar reading (see; Phillip) in section 236 of the UK Merchant Shipping Act 1995 (sec. 518 of an earlier Act) as decided by the Court in the *Lusitania* [1986] QB 384.

<sup>68</sup> Sec. 377(1) MSO 1952.

<sup>69</sup> Ibid.

<sup>70</sup> Sec. 376, Ibid.

<sup>71</sup> Sec. 377(2), Ibid.

'sell the same, and shall pay the proceeds of the sale into the Treasury, after deducting there from the expenses of the sale and any other expenses incurred by him and his fees and paying there out to the salvors such amount of salvage as the Minister in each case or by any general rule determines.'<sup>72</sup> Upon the 'delivery of the wreck' concerned or upon 'payment of the proceeds of sale of wreck by a receiver' and this will consequently discharge the Receiver from all liability relating to the wreck. However, this 'shall not prejudice or affect any question which is raised by third parties concerning the right or title to the wreck'<sup>73</sup> and should not 'have any effect in determining title to wreck not yet claimed or of which possession has not yet been taken'.<sup>74</sup>

These powers and duties of the Receiver of Wrecks are very wide. Some of them have been taken over by the Heritage Commissioner where it concerns with underwater cultural heritage. Under the National Heritage Act 2005, anyone who discovers an underwater cultural heritage shall report such discovery to the Heritage Commissioner or to the Port Officer,<sup>75</sup> who will then transmit all necessary information to the Heritage Commissioner and where possible, deliver such objects to the Commissioner.<sup>76</sup> The Commissioner will then keep custody of such underwater cultural heritage for a period of one year, during which time anyone can come forward to establish his claims,<sup>77</sup> otherwise the underwater cultural heritage remains the property of the Federal government.

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<sup>72</sup> Sec. 379(1), Ibid.

<sup>73</sup> Sec. 380, Ibid.

<sup>74</sup> This is based on a similar reading in section 236 of the UK Merchant Shipping Acts 1995. See; the *Lusitania* [1986] Q.B. 384.

<sup>75</sup> Sec. 61(1), National Heritage Act 2005.

<sup>76</sup> Sec. 61(2), Ibid.

<sup>77</sup> Sec. 66(3), Ibid.



## 5.5 Dealings in Wreck

### 5.5.1 Sale and Disposal of Salvaged Wreck

Generally, the Receiver of Wreck has the power to dispose of a wreck by selling it to interested party. He may sell wrecks in his custody if he is satisfied that the wreck is well under the value of 'one hundred dollars' and if the wrecks is in such condition that is so damaged or 'of perishable nature that it cannot be of advantage' to be any longer kept in the custody of the Receiver or otherwise 'not of sufficient value to pay for warehousing'.<sup>78</sup> The rationale for the immediate sale of such wrecks is for the Receiver to capitalise on the proceeds of the sale thereof 'for the same purposes and subject to the same claim, rights and liabilities as if the wreck had remained unsold'<sup>79</sup> after defraying all necessary expenses. Section 390 of the MSO 1952 provides that:

Where any vessel is wrecked, stranded, or in distress at any place on or near the coasts of the Federation, or in any tidal water within the limits of the Federation, and services are rendered by any person in assisting that vessel or saving the cargo or apparel of that vessel or any part thereof, and where services are rendered by any person other than a receiver in saving any wreck, there shall be payable to the salvor by the owner of the vessel, cargo, apparel or wreck, a reasonable amount of salvage to be determined in case of dispute in manner hereinafter mentioned.<sup>80</sup>

If salvage rules are to be applied to historic shipwrecks without considering their special circumstances, the consequences could be unfortunate. Among other things, the granting of salvage awards which might as well include all artefacts found together with the wreck. This issue raises question of the preservation and conservation of artefacts and the question of disposals of artefacts into private ownership. This problem is addressed by transferring the Receiver of Wrecks' power to deal with the underwater

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<sup>78</sup> Merchant Shipping Ordinance 1952.

<sup>79</sup> Section 378(2) of MSO 1952.

<sup>80</sup> Section 390 Merchant Shipping Ordinance 1952.

cultural heritage to the Heritage Commissioner, who will deal with the wreck in question according to the procedures laid down under the National Heritage Act 2005.

### 5.5.2 Removal of Wreck

A wreck, whether of historical significance or not, could be a navigational hazard. The Marine Department implements a warning system for the notification of hazardous wrecks, for the safety of the mariners in various shipping routes in Malaysian waters including the Straits of Malacca and the Straits of Johor. The Marine Department from time to time issues notice to mariners if a navigation hazard is known.<sup>81</sup> When 'any ship is sunk, stranded or abandoned in any port, navigable river, tidal waters or in any place within Malaysia waters' becomes 'an obstruction or danger to navigation or a public nuisance or to cause inconvenience' it is the responsibility of the Receiver and the Marine Department under the Ordinance to either:

- (a) take possession of, and raise, remove or destroy, the whole or any part of the ship;
- (b) light or buoy any such ship or part until the raising, removal or destruction thereof;
- (c) sell, in such manner as he thinks fit, any ship or part so raised or removed and also any other property recovered in the exercise of his powers under this section, and, out of the proceeds of the sale, reimburse himself for the expenses incurred by him in relation thereto under this section, and the receiver shall hold the surplus, if any, of the proceeds in trust for the persons entitled thereto; and
- (d) take all necessary measures to prevent pollution from the ship;  
or alternatively -
- (e) consent to the owner or master of the ship taking such action under paragraphs (a) to (d) as the receiver thinks fit; and
- (f) require the owner or master to furnish security in such reasonable amount as the receiver may consider necessary for the purpose of ensuring the performance of all actions which the owner or master has agreed to undertake.

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<sup>81</sup> Updates and notices relevant to various coastguard stations are available at <http://www.marine.gov.my>.

(2) Apart from the proceeds of any sale carried out by the receiver pursuant to paragraph (c) of subsection (1), the receiver may also resort to the security furnished under paragraph (f) to reimburse himself and if the proceeds of sale together with any security are insufficient to cover the costs incurred by the receiver when acting under paragraphs (a) to (d) of subsection (1), he may recover the difference from the owner or master of the ship concerned. (A792/91)

It must be noted that the above provisions relating to removal of wrecks shall also:

Apply to every article or thing or collection of things being or forming part of the tackle, equipments, cargo, stores or ballast of a vessel in the same manner as if it were included in the term 'vessel' and for the purposes of these provisions any proceeds of sale arising from a vessel and from the cargo thereof, or any other property recovered there from, shall be regarded as a common fund.<sup>82</sup>

The Ordinance also allows the Receiver to apply a search warrant from the Magistrate's Court 'where a receiver suspects or receives information that any wreck is secreted or in the possession of some person who is not the owner thereof, or that any wreck is otherwise improperly dealt with.'<sup>83</sup> The procedures for the search are in the following terms:

Such Court may grant such a warrant, and the receiver, by virtue thereof, may enter any house or other place wherever situate and also any vessel and search for, seize and detain any such wreck there found',<sup>84</sup> and,

If any such seizure of wreck is made in consequence of information given by any person to the receiver, the informer shall be entitled, by way of salvage, to such sum not exceeding in any case fifty dollars as the receiver allows.<sup>85</sup>

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<sup>82</sup> Sec. 383 of MSO 1952.

<sup>83</sup> Sec. 386(1), Ibid.

<sup>84</sup> Sec. 386(2), Ibid.

<sup>85</sup> Sec. 386(3) of the Merchant Shipping Ordinance 1952.

## 5.6. The Determination of Salvage Dispute

Dispute over salvage amount should be distinguished from disputes over the actual amount payable to the Receiver for all expenses incurred by him, which includes Receiver fees as mentioned above.<sup>86</sup> If the latter case is the essence of the dispute, the dispute shall be determined by the Minister<sup>87</sup> and his decision shall be considered final.<sup>88</sup> This section concerns the former type of dispute.

### 5.6.1 Court Jurisdiction

We have seen earlier that the admiralty jurisdiction in Malaysia is governed by the Court of Judicature Act 1964.<sup>89</sup> The Merchant Shipping Ordinance 1952 provides that:

Subject to this Ordinance and any Imperial Act in force in the Federation or any part thereof, the High Court shall have jurisdiction to decide upon all claims whatsoever relating to salvage, whether the services in respect of which salvage is claimed were performed on the high seas or within the Federation, or partly on the high seas and partly within the Federation, and whether the wreck in respect of which salvage is claimed is found on the sea or on the land or partly on the sea and partly on the land.<sup>90</sup>

However, Ordinance also provides for the jurisdiction of the sessions courts in certain circumstances and the possibility of dispute resolution through other dispute resolving mechanism such as mutual agreement or arbitration. Section 393 provides:

(1) Disputes as to the amounts of salvage can arise either in respect of salvage of life or of property regardless whether the salvage concerned took place within or outside the Federation, arising between the salvor and the owners of any vessel, cargo, apparel or wreck shall, if not settled

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<sup>86</sup> Sec. 404(1), Ibid. Also fees as enumerated in the Ninth Schedule of MS) 1952.

<sup>87</sup> Minister means minister in charge of merchant shipping - Section 2(a) of MSO 1952.

<sup>88</sup> Section 404(3) MSO 1952.

<sup>89</sup> Above, para 2.4.

<sup>90</sup> Merchant Shipping Ordinance 1952 Section 403.

by agreement, arbitration or otherwise, be determined summarily by a Sessions Court in any case where –

- (a) the parties to the dispute consent; or
- (b) the value of the property saved does not exceed five thousand dollars; or
- (c) the amount claimed does not exceed one thousand dollars.

(2) Subject as aforesaid, disputes as to salvage shall be determined by the High Court, but if the claimant does not recover in the High Court more than one thousand dollars, he shall not be entitled to recover any costs, charges or expenses incurred by him in the prosecution of his claim unless such Court certifies that the case is a fit one to be tried by the High Court.

(3) Disputes relating to salvage may be determined on the application either of the salvor or of the owner of the property saved or of their respective agents.

The determination of dispute over the salvage of historic wreck contract awarded to a salvage company will also depend on the specific terms under the special contract, which does not necessarily follow dispute resolution provided under the Merchant Shipping Ordinance. The only dispute between the Government of Malaysia and the Salvage company on the apportionment of the *Diana* wreck artefacts was agreed in the agreement to be arbitrated at the Kuala Lumpur Regional Centre for Arbitration. However, the decision of the arbitration over the dispute between the government and the private company over the alleged distribution of artefacts could not be studied as both parties objected to anyone researching on the arbitration decision.

### 5.6.2 Factors Considered for the Distribution of Salvage

According to the *Blackwall* rules,<sup>91</sup> there are six factors to be taken into account for the determination of salvage amount; ‘the labor expended by the salvors in rendering the salvage service’, ‘promenitude, skill, and energy displayed in rendering the service and

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<sup>91</sup> *The Blackwall* 77 U.S 1 (1869) cited in Nafziger, ‘The Evolving Role of Admiralty Courts in Litigation Related to Historic Wreck’ (2003) HARV. INT’L L. J. 251, at f.n. 13.

saving the property', 'the value of the property employed by the salvors in rendering the service', 'the danger to which such property was exposed', 'the risk incurred by the salvors in securing the property from the impending peril', 'the value of the property saved' and 'the degree of danger from which the property was rescued'. These criteria have become standard and found their way into the Merchant Shipping Ordinance. The Ordinance provides that in determining the amount payable to the Salvor for successful salvage under section 389 or section 390 of the Merchant Shipping Ordinance 1952, or in the case where there is more than one Salvors, the proportion in which the remuneration is to be distributed among the salvors, the following are the criteria that shall be taken into consideration by the Court<sup>92</sup>:-

- (a) the measure of success obtained;
- (b) the effects and deserts of the salvors;
- (c) the danger run by the salved vessel, by her passengers, crew, and cargo;
- (d) the danger run by the salving vessel and the salvors;
- (e) the time expended, the expenses incurred, the losses suffered, and the risks of liability and other risks run by the salvors and the value of the property exposed to such risks, due regard being had to the special appropriation (if any) of the salvors' vessel for salvage purposes;
- (f) the value of the property salved.

Apart from these criteria, one criteria should be added in relation to historic wrecks and the underwater cultural heritage – that there should be due consideration on the special need for scientific endeavours for preserving the collective integrity of historic wrecks, its associated artefacts and environment. In the United States, the Court in *Colombus-*

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<sup>92</sup> Section 396(1) of MSO 1952. C.f. Article 13(1) of the Salvage Convention 1989 which provides for an elaborate criteria for fixing salvage reward: '(a) the salved value of the vessel and other property; (b) the skill and efforts of the salvors in preventing or minimizing damage to the environment; (c) the measure of success obtained by the salvor; (d) the nature and degree of the danger; (e) the skill and efforts of the salvors in salving the vessel, other property and life; (f) the time used and expenses and losses incurred by the salvors; (g) the risk of liability and other risks run by the salvors or their equipment; (h) the promptness of the services rendered; (i) the availability and use of vessels or other equipment intended for salvage operations; (j) the state of readiness and efficiency of the salvor's equipment and the value thereof.'

*America Discovery Group v Atlantic Mutual Insurance Company*<sup>93</sup> recognised the amount of time and money expended through salvor's scientific research in the project in addition to other normal criteria in fixing salvage reward. On this issue, it is also crucial to note that under the existing system under MSO 1952, there is no incentive for a salvor to protect the environment when they undertake a salvage operation since their reward comes from saving the ship, crew and its cargo. It is worth considering the need to compensate salvors for the steps taken to minimise damage to the associated environment.<sup>94</sup>

### 5.6.3 Valuation of Property

The determination of the value of a particular wreck is assessed according to its own special circumstances, either 'as a going concern', which includes 'the consideration of pending profitable engagements' or its value to the owners in its 'damaged condition'.<sup>95</sup> This assessment is solely on the ship. The assessment of the value of the cargo is however a separate concern. Shipping practice and regulation in Malaysia requires that 'where any dispute as to salvage arises, the receiver of the district where the property is in respect of which the salvage claim is made may, on the application of either party, appoint a valuer to value that property, and shall give copies of the valuation to both parties.'<sup>96</sup>The National Committee for the Management of Historic Wrecks has incorporated this practice into the Special Guidelines as noted earlier.<sup>97</sup>

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<sup>93</sup> (1995) AMC 1985 (US Court of Appeals, 4<sup>th</sup> Circuit) but on this point see (1992) AMC 2705.

<sup>94</sup> In some countries such as Ireland, owners of vessels are required by law to compensate salvors who have taken steps to minimise damage to the environment, even in cases where the salvage operation itself has been unsuccessful.

<sup>95</sup> Hill, C., *Maritime Law*, 6<sup>th</sup> Edition, 2003, LLP, London, p. 368. Recent English case law on this point is the *Yolaine* [1995] 2 Lloyd's Rep. 7, but see also; *The Queen Elizabeth* [1949] 82 Ll.L.Rep. 803.

<sup>96</sup> Section 398(1). 398(2) provides that a copy 'of the valuation purporting to be signed by the valuer, and to be certified as a true copy by the receiver, shall be admissible as evidence in any subsequent proceeding.'

<sup>97</sup> See; ch. 3 para 3.5.3.



#### **5.6.4 Apportionment of Salvage**

Section 402 of the Ordinance provides for the apportionment of salvage by the High Court<sup>98</sup> that:

whenever the aggregate amount of salvage payable in respect of salvage service rendered in the Federation has been finally ascertained and exceeds one thousand dollars, and whenever the aggregate amount rendered elsewhere has been finally ascertained, whatever that amount may be - in the event of any delay or dispute arising out of the apportionment, the High Court may (such order could include):

- (a) cause the same to be apportioned amongst the persons entitled thereto in such manner as it thinks just, and may for that purpose, if it thinks fit, appoint any person to carry that apportionment into effect;
- (b) compel any person in whose hands or under whose control the amount may be to distribute the same or to bring the same into Court to be there dealt with as the Court directs; and
- (c) may for the purposes aforesaid issue such processes as it thinks fit.

Apportionment of salvage in relation to projects undertaken between the government and private salvage company, however, may not adhere to special formula agreed upon between the government and the company.<sup>99</sup> In the event of a dispute, both parties may also choose arbitration instead of a court procedure as method of dispute settlement.

### **5.7 Other Activities Affecting Underwater Cultural Heritage**

#### **5.7.1 Introduction**

The UNESCO Convention 2001 was drafted mindful of the need to address certain issues relating to 'activities' which might 'directly or indirectly' affect underwater cultural heritage'. Consequently, the examination of issues relating to the protection of the underwater cultural heritage must also cover these 'other activities'. This section will first briefly explain how these activities affect the underwater cultural heritage and

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<sup>98</sup> High Court of Malaya for Peninsular Malaysia, Sabah and Sarawak and respectively.

<sup>99</sup> See also, ch. 3, para 3.5.3.

whether the existing frameworks of laws in Malaysia provide for the necessary legal protection.

### 5.7.2 Destructive Fishing and Its Impact on Underwater Cultural Heritage

Regarding ocean resources,<sup>100</sup> the Department of Fisheries is entrusted with the responsibility of regulating activities that affect the flora and fauna of the sea. In terms of sustaining and managing these resources, it is not only the exploitation of these resources alone which are the main focus of the Department but also 'the management of the fishers, the people and the marine water areas.'<sup>101</sup> In Malaysia, the economics of fishery needs careful consideration. Fisheries, together with oil and gas, shipping and marine tourism, constitute Malaysia's key marine industries.<sup>102</sup> Marine fishing industry itself makes up about 90% towards Malaysia's total fish production.<sup>103</sup>

Fisheries are listed as a Federal matter under the Federal Constitution<sup>104</sup> and it is governed through the implementation of the Fisheries Act 1985,<sup>105</sup> which came into force on 1<sup>st</sup> January 1986. The Act governs all matters pertaining to 'fisheries, including conservation, management and the development of maritime and estuarine fishing and

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<sup>100</sup> Legal provisions on natural resources exploitation includes both the Continental Shelf Act 1966 (Revised 1972) and the Exclusive Economic Zones Act 1984 but the former is outdated as it does not take into account the developments achieved under 1982 UNCLOS. As far as natural resources as concerned, the matter is under the Ministry of Science, Technology and Environment. But historic wrecks are not considered as natural resources and therefore not a concern of the Ministry. Attention is thus turned to the Department of Heritage, in principle, but also the Fisheries Department incidentally.

<sup>101</sup> Najib Ramli, *Isu dan Implikasi ke atas kawasan Marin yang Telah di Lindungi*, Prosiding Deraf Konvensyen Pemeliharaan Warisan Kebudayaan Bawah Air, 2002, p. 20.

<sup>102</sup> See: <http://www.apec-oceans.org/economy%20profile%20summaries/malaysia-approved.pdf>.

<sup>103</sup> Abu Talib, A., G.H. Tan and Y. Abd. Hamid, *Overview of the national fisheries situation with emphasis on the demersal fisheries off the West Coast of Peninsular Malaysia*, 2003, p. 833. In G. Silvestre, L. Garces, I. Stobutzki, M. Ahmed, R.A. Valmonte-Santos, C. Luna, L. Lachica-Alino, P. Munro, V. Christensen and D. Pauly (eds.) *Assessment, Management and Future Directions for Tropical Coastal Fisheries in Asian Countries*. World-Fish Centre Conference Proceedings 67.

<sup>104</sup> Schedule 9 of the Federal Constitution.

<sup>105</sup> Act 317.

fisheries, in Malaysian fisheries water, to turtle and riverine fishing in Malaysia and to matters connected therewith or incidental thereto.<sup>106</sup> The earliest Fisheries legislation introduced in Malaysia was the Fisheries Ordinance 1909, which was amended a number of times before being finally repealed by Fisheries Rules 1951. It was reported that the method of Malaysian 'fishing industry at that time was mostly traditional fisheries' and therefore the regulatory aspect of the industry was rather minimal.<sup>107</sup> There were some developments in 1960s till 1970s in terms of fishing methods which 'created much conflict with traditional fishers' and this had led to the introduction of a much more comprehensive regulation of fisheries through the Fisheries Act 1963.<sup>108</sup> This 1963 Act survived until 1985, when it was repealed by the current Fisheries Act 1985.

The drafting of Fisheries Act 1985 was made mindful of the development that took place a few years earlier – the 1982 UNCLOS. The new Act incorporates regulation of fisheries in the areas of Exclusive Economic Zone,<sup>109</sup> its particular significance being the power conferred to the Director-General for the monitoring, control and surveillance of fishing vessels operating in Malaysian Exclusive Economic Zone. Today, Fisheries Act 1985<sup>110</sup> remains the central piece of legislation governing the fisheries activities in Malaysian maritime and estuarine waters and its implementation is supported by other subsidiary regulations for the purpose of management and conservation of marine resources such as:

- a) Fisheries (Marine Culture System) Regulations 1990
- b) Fisheries (Maritime) Regulations 1967

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<sup>106</sup> Preamble to the Fisheries Act 1985.

<sup>107</sup> Abu Talib, A., below, p. 871.

<sup>108</sup> Ibid.

<sup>109</sup> Malaysian EEZ as defined under sec. 3 of the Exclusive Economic Zone Act 1984 (Act 311).

<sup>110</sup> This section concentrates on the Fisheries Act 1985 to the extent it being relevant for the protection of underwater cultural heritage in Malaysia.

- c) Fisheries (Maritime) regulations (Sarawak) 1976
- d) The Fisheries Regulations 1964
- e) Establishment of Marine Parks and Marine Reserves Order 1994
- f) Fisheries (Conservation and Culture of Cockles) Regulations 1964
- g) Fisheries (Prohibition of Methods of Fishing) Regulations 1980
- h) Fisheries (Licensing of Local Fishing Vessels) Regulations 1985
- i) Fisheries (Closed Season for the Catching of Grouper Fries) Regulations 1996

In determining fisheries jurisdiction, Malaysian fisheries waters are to be contrasted from Malaysian maritime waters, internal waters<sup>111</sup> as well as Malaysian territorial sea.<sup>112</sup> The Act defines Malaysian fisheries water as 'maritime waters under the jurisdiction of Malaysia over which exclusive fishing rights or fisheries management rights are claimed by law and includes the internal waters of Malaysia, the territorial sea of Malaysia and the maritime waters comprised in the exclusive economic zone of Malaysia.'<sup>113</sup> Malaysia's maritime waters on the other hand, comprise of the areas of the sea which are adjacent to Malaysia 'both within and outside Malaysian fisheries waters and includes estuarine waters, and any reference to marine culture system, fishing or fisheries shall be constructed as referring to the conduct of any of these activities in maritime waters.'<sup>114</sup>

The relationship between fishing regulation and the protection of underwater cultural heritage must be examined through the enforcement of Fisheries regulations since there is no denying that fishing is a part of those activities 'indirectly' affecting underwater

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<sup>111</sup> Section of the Fisheries Act 1985 defines Malaysian internal waters as 'any areas of the sea that are on the landward side of the baselines from which the breadth of the territorial sea of Malaysia is measured.'

<sup>112</sup> Territorial sea of Malaysia is as determined in accordance with the Emergency (Essential Powers) Ordinance No. 7 (1969) (P.U.(A) 146/69) The Ordinance was repealed by Emergency (essential Powers) Act 1979 (Act 216).

<sup>113</sup> Part 1 Section 2 of the Fisheries Act 1985.

<sup>114</sup> Section 2 of the Fisheries Act 1985.

cultural heritage especially historic wrecks. There are numerous reports on how the heritage was accidentally destroyed as a result of fishing activities. Most common problem affecting the underwater cultural heritage, which arose from fishing activities are the use of trawler nets - unintentionally destroy archaeological sites.<sup>115</sup> Another problem is the clandestine removal of objects from sites and the illicit trade by fishermen to middlemen and treasure hunters.<sup>116</sup> In one report, the destructive impact of the use of trawl fishing has been compared to that of 'clearing of forest that threatened biological diversity and economic sustainability.'<sup>117</sup> If fishing can be a form of activity that could have detrimental effect on the underwater cultural heritage, it is necessary at the outset to identify such scenario; types and techniques of fishing which are allegedly detrimental to this heritage. Furthermore, the implementing agencies must also recognise other rightful multiple uses of the maritime waters. In practical terms however, this poses a serious challenge to fishing management efforts in Malaysia. In 2002, a representative from The Department of Fisheries commented that: 'the fragile and invaluable flora and fauna, 18,564 fishing vessels, 51,299 fishers' and 'thousands of other people will be affected if the marine ecosystem is damaged due to one or more reasons'<sup>118</sup> and Malaysia being a developing country, 'the economic sensitivity of the fishers in general is one of the main concerns that need to be handled delicately.'<sup>119</sup>

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<sup>115</sup> Information by the Department of Museum and Antiquity.

<sup>116</sup> Ibid.

<sup>117</sup> Zaihatun Mahani Zakariah, Destructive Fishing in Malaysia – the need for local participation in fisheries management, MIMA Paper available at:

[http://www.mima.gov.my/mima/htmls/papers/pdf/zmz/zmz\\_busan.pdf](http://www.mima.gov.my/mima/htmls/papers/pdf/zmz/zmz_busan.pdf). See also: Les Waitling and Elliot A. Norse. *Disturbance of the Seabed by Mobile Fishing Gear Comparison with Forest Clear Cutting Conservation Biology*: 12: 1180-1197, available at: <http://www.icsea.or.id/seaspan/0199/MC010711.htm>.

<sup>118</sup> Najib Ramli, above, p. 20.

<sup>119</sup> Ibid.

On the other hand, interestingly, although fishing activity like trawling net fishing has often been cited as one of the major causes of destruction to the underwater cultural heritage, it is through these incidences that many important discoveries of the heritage were made. One such scenario is the discovery of *Desaru* near Johor in Peninsular Malaysia. The role played by fishermen over the discoveries of underwater cultural heritage was clearly indicated in the surveying report as follows:

Initial information came from a bottom trawler, which twice snagged its nets, and in them found a few pottery shards and one piece of ship's timber. The position provided was imprecise, but a local fisherman was able to point out three spots where he had snagged his drift net. While moving about the area to obtain his locations, a few spots with fish were noticed on the depth sounder. Fish are often attracted to wreck sites, and one of these spots was indeed part of the wreck. The discovery was timely, as the site had already been damaged by bottom trawlers, and might soon have become undetectable using today's technology.<sup>120</sup>

The same problem was also encountered involving the *Turiang* wreck,<sup>121</sup> and the *Longquan* wreck.<sup>122</sup> Trawl net fishing is thus one such activity that, although not directly targeted at the underwater cultural heritage, has had a significant impact on such heritage considering the accidental damage it may cause to the wreck and its site. It is thus vital to educate fishing community of the significance of this heritage. The main weakness under the previous protection mechanism under the repealed Antiquities Act 1976 was the absence of interim protection measures covering the period between the report of discovery of the wreck and the actual designation of the heritage site made by the Director of Department of Museum and Antiquity.<sup>123</sup> This has largely contributed to

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<sup>120</sup> Maritime Asia, 'Desaru', at <http://www.maritimeasia.ws/desaru/site.html> (Undated - last visited October 2005).

<sup>121</sup> <http://www.maritimeasia.ws/turiang/site.html> (Undated - Last visited October 2005).

<sup>122</sup> <http://www.maritimeasia.ws/exhib01/pages/p014.html> (Undated - Last visited October 2005).

<sup>123</sup> Sec. 33(1) of the National Heritage Act 2005 provides for interim measures in relation to heritage site on and but no similar provision is made for the underwater cultural heritage.

further damage and clandestine treasure hunting on the archaeological site. The following two passages from the *Desaru* wreck report are illustrative of the problem:

The timing of work on the site was dependent on necessary official approvals, as well as on the seasons. A surface investigation was conducted in June 2001; the ship's cargo was recovered in Oct-Nov 2001; and site measurements and mapping continued during April, May and September 2002. Returning to the site in early April 2002, it was found littered with broken planks and misplaced bulkhead frames. The official buoy requested to protect the site was first installed on 13 Dec 2001, a full month after the first recovery season ended; meanwhile trawlers had been active. Missing bulkhead planks showed that the site had been damaged after the recovery phase and before the buoy was in place. Newly deposited sand and mud, again level with the surrounding seafloor, was higher than the missing planks. Further damage to the site occurred between May and September 2002, despite a marker buoy close to the wreck. On returning to the site for final measurements, a long steel chain and parts of a trawl net were found stuck in the ship's timbers. Three large and heavy longitudinal beams belonging to the mast support had vanished altogether.<sup>124</sup>

The company started operation on 7 April 2003, and on 15 April, they discovered the wreck site following input by numerous fishermen on 15 April. The discovery report dated 27 April 2003 was submitted to the Government and again it is disappointing to note in the report the kind of damage and loss incurred:

When the initial inspection ended on 16 April due to the onset of spring tide, two intact storage jars was left partly buried as a marker for continued inspection. Returning on 21 April, these two jars were lying next to their original location, smashed to pieces. The same evening a marker buoy was left on the site for ease of continued work. Returning early the following morning, a small fishing boat was found anchored at the site, its crew preparing to dive. Leaving the site in the evening of 22

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<sup>124</sup> <http://www.maritimeasia.ws/desaru/site.html>.



April after back-filling the test holes, two similar fishing boats with hose-diving gear were seen travelling towards the site.<sup>125</sup>

This scenario results from lack of manpower for enforcement operation. Would the closing down of an otherwise legal fishing area be a workable solution? According to Najib Ramli of the Department of Fisheries, if the closing of certain fishing indeed become necessary due to the discovery the underwater cultural heritage, it 'must be made with care, with wide publicity and with clear information being given to the fishers' and this will have to involve clear marking on navigation map and in situ marking. The total closing of an otherwise legal fishing areas may also not be possible as the economic sensitivity of the fishers needs to be considered and in this regard, Ramli suggested that 'to some extent, safe fishing activities be allowed to ease tension among the fishers'.<sup>126</sup> On this note, no assessment can be made on the establishment of 'protected zone', which can be made pursuant to the National Heritage Act 2005 as relevant regulations are still being drafted.

### 5.7.3 Tourism Related Activities in Marine Parks and Coastal Areas

Malaysia needs no introduction to its 'wide variety of natural ecosystems and habitats', which support the 'rich and diverse fauna and flora' that make Malaysia as one of the world's 12 'mega-diversity countries'.<sup>127</sup> Some of the 'major threats to Malaysia's terrestrial biodiversity include unsustainable forest management practices, land conversion (particularly for agriculture and plantation development) and hunting of wildlife or over collecting of non-timber forest products'.<sup>128</sup> The main threats to the

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<sup>125</sup> Ibid.

<sup>126</sup> Najib Ramli, *Isu dan Implikasi terhadap ke atas kawasan marin yang telah dilindungi*, in Bengkel Deraf UNESCO Convention 2002, p. 20.

<sup>127</sup> Buhl-Nielsen, E., *Danced/EPU report on Malaysian-Danish Country Programme for Cooperation in Environment and Development (2002-2006)*, (2001) available at: [http://www.mst.dk/udgiv/publications/2001/87-7944-557-8/html/default\\_eng.htm](http://www.mst.dk/udgiv/publications/2001/87-7944-557-8/html/default_eng.htm) (last visited on 12/11/2005).

<sup>128</sup> Ibid.

coastal and marine biodiversity includes 'land reclamation, pollution from land based sources and marine shipping, poorly planned development and over exploitation of fishery and other resources.'<sup>129</sup> Sustainability of the marine ecosystem and the sustainable use marine living resources as a whole is thus a matter of great concern to Malaysia.

The gist of the problems associated with certain underwater tourism and their impact on underwater cultural heritage is stated in the Council of Europe Report as follows:

Underwater tourism presents a different set of problems and opportunities. The increasing popularity of sport diving, with its increasingly sophisticated equipment, has the effect that increasing numbers of amateurs are visiting underwater wrecks. Some are responsible for minor looting when they take home souvenirs for their home collections, or chance finds which have a windfall commercial value. But even when they do not remove parts of wrecks associated objects, merely through the activity of visiting they may disturb, damage and erode them.<sup>130</sup>

In a developing economies such as Malaysia, cultural and natural heritage sites are capable of becoming lucrative tourism products. Malaysia is actively promoting the growth of its tourism industry under the aegis of the Ministry of Tourism.<sup>131</sup> In recent years, the Government has attempted to recommend seven sites to be listed in the World Heritage List.<sup>132</sup> The tourism allocation development plan for the 9<sup>th</sup> Malaysia Plan (2006 – 2010) also sees a significant increase from the amount allocated for the same programmes during the 8<sup>th</sup> Malaysia Plan (2001 – 2005).<sup>133</sup> The allocation focus is a combination of programmes through 'the preservation and conservation of national

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<sup>129</sup> Ibid.

<sup>130</sup> available at <http://www.assembly.coe.int/Documents/WorkingDocs/doc00/EDOC8867.htm>.

<sup>131</sup> Up until the recent Ministry reform in April 2004, it was The Ministry of Culture, Arts and Tourism.

<sup>132</sup> Four sites that were nominated as cultural heritage sites are the Bujang Valley in Kedah, the Niah Caves in Sarawak, the inner (historic) city of Melaka and the Lebuah Aceh Mosque while Taman Negara (National Park) in Pahang, the Mulu Caves in Sarawak and the Kota Kinabalu National Park in Sabah were all nominated as natural heritage sites.

<sup>133</sup> Table I.

historical sites, beautification and environment protection, tourism product development as well as the provision of medium-budget accommodation and tourism-related infrastructure facilities.’<sup>134</sup> The arrival of tourists in islands that have been declared as ‘marine parks’ has also increased significantly according the figures released for the 8<sup>th</sup> Malaysia Plan.<sup>135</sup>

**Table 1:** *Development Expenditure and Allocation for Tourism 2001 – 2010*<sup>136</sup>

| PROGRAM                                     | 8 <sup>th</sup> M P<br>(2001-2005) | 9 <sup>th</sup> M P<br>(2006-2010) |
|---|------------------------------------|------------------------------------|
| Environmental Protection and Beautification | 243.1                              | 652.1                              |
| Facilities, Structure and Maintenance       | 459.4                              | 1,304.8                            |
| Accommodation                               | 31.7                               | 115.0                              |
| Others                                      | 49.4                               | 46.0                               |
| <b>TOTAL (RM) Million</b>                   | <b>783.6</b>                       | <b>1,847.9</b>                     |

**Table 2:** *Marine Park Tourism*<sup>137</sup>

| YEAR | NUMBER OF TOURISTS |
|------|--------------------|
| 1988 | 1,373              |
| 1996 | 109,893            |
| 2000 | 240,000            |
| 2004 | Data Not available |

In recent years there has been an upsurge of local and foreign visitors to marine parks in Malaysia. From the year 1988 to 2000 the numbers have increased rather dramatically due to the vigorous promotional works of ‘Visit Malaysia’ and ‘Malaysia Truly Asia’ by the Ministry of Tourism. According to the Economic Planning Unit Malaysia, the

<sup>134</sup> 8<sup>th</sup> Malaysia Plan, p. 454.  
<sup>135</sup> Table 2.  
<sup>136</sup> Source: National Economic Planning Unit, Kuala Lumpur, Malaysia.  
<sup>137</sup> Source: National Economic Planning Unit, Kuala Lumpur, Malaysia.

growth will continue at an average the rate of 7.5% per annum.<sup>138</sup> However, along with this growth, there is a concern on the impact of these tourism activities in the marine environment. Most of the population in these tourism places are concentrated on coastal areas and islands, dependent on tourism for their livelihood. This includes the hospitality industry, training and diving centres, charter boats and other marine park and resort islands related tourism. Although the management of the marine parks in Malaysia has been said to be 'motivated by the philosophy of conservation and protection' population dependence on tourism as main livelihood has resulted in the increase of 'pressure to manage the people and the activities generated by them.'<sup>139</sup> As a result, the government promises 'a more integrated approach to tourism planning and implementation' in the recently announced 9<sup>th</sup> Malaysia Plan, for the good governance and 'sustainable development of the industry' emphasising on 'preserving and enhancing existing natural and cultural assets that are susceptible to environmental damage.'<sup>140</sup>

Preserving underwater cultural heritage as a tourism product does not mean that the heritage concerned has to end up in a Museum collection although this is one of the ways to fulfil the objectives of educating the public regarding their heritage. In Malaysia, this has been achieved with the establishment of the semi permanent Maritime Museum in the year 2000 showcasing some of the artefacts salvaged through partnership with private company. Apart from this, snorkelling and underwater diving including wreck diving are also a potential marine tourism product as they are becoming a popular recreational activities in Malaysia.<sup>141</sup> If regulated properly, they do

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<sup>138</sup> Economic Planning Unit, *The Third Outline Perspective Unit (2001-2010)*, 2001, p. 173.

<sup>139</sup> Najib Ramli, above, note 125, p. 23.

<sup>140</sup> Economic Planning Unit, *9<sup>th</sup> Malaysia Plan (2006-2010)*, 2006, p. 200.

<sup>141</sup> It has been said that wreck diving 'goes back to before the time of Christ, when salvors practiced breath-holding to recover goods from sunken merchant vessels'. See: Gentile, G. 'Shipwreck Legislation: Legality

not adversely affect the surrounding marine ecosystem. Areas that are coral rich and where shipwrecks and artificial reefs are located are becoming popular dive sites.<sup>142</sup> In this sense, the discovery of more underwater cultural heritage can promote the growth of tourism activities such as scuba diving and in return does provide the supply of a heritage product to the tourism industry as a whole. However, there is no single enforcement agency which at the moment regulates such activities.<sup>143</sup>

Three islands near Sabah of East Malaysia; Kumaran, Rusukan Kecil and Rusukan Besar, have all been declared as Marine Parks due to their spectacular beauty and ecosystem values. Interestingly, the main factor that attracts tourists to these islands is not their natural beauty but the existence of several World War II wrecks lying around in the area. Some of these wrecks happen to be State vessels, namely the USS Salute which is an American warship and secondly the SS De Klerk a Dutch state vessel sank down by the Australian Air Force during the war.<sup>144</sup> The other two vessels are the MV Mabini (a Philippines vessel) and the 'Simen' wreck (a Japanese cargo vessel), both sank in the 80s. Several other wrecks located near Kudat, Sabah, show that in situ preservation is the best and plausible option due to their stunning collective environmental and ecosystem value as coral reef park. Some of these wrecks are covered by colourful spans and soft corals with surrounding habitat including glass fish, lion fish, the scorpion fish and some other exotic species.<sup>145</sup> These wrecks are yet to be identified but they are believed once were commercial vessels. The creation of new laws on underwater cultural heritage without the necessary guarantee for non-intrusive public access will actually work against the whole idea of preserving the endangered heritage.

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v. Morality' online article at: <http://www.theadvocates.org/freeman/8906gent.html> (undated, last visited on 13/11/2005).

<sup>142</sup> Najib Ramli, above, note 125, p. 23.

<sup>143</sup> Except in the case of the establishment or the creation of marine parks as provided under section 43 of the Fisheries Act 1985, which regulated by the Department of Fisheries.

<sup>144</sup> Sabah Tourism Board: [http://www.sabahtourism.com/malay/guide/diving\\_labuan.asp](http://www.sabahtourism.com/malay/guide/diving_labuan.asp).

<sup>145</sup> Sabah Tourism Board: [http://www.sabahtourism.com.my/malay/guide/diving\\_wreck.asp](http://www.sabahtourism.com.my/malay/guide/diving_wreck.asp).

The 2001 UNESCO Convention guarantees this right of 'public benefit' except in cases where this would work contrary to the objectives of the Convention.<sup>146</sup> It is uncertain whether further regulations pertaining to the establishment of protected zone will actually address these issues. In the case of the marine parks, the Director General of the Fisheries Department has the power to establish Marine Park and Marine Reserve in Malaysia for the purpose of:

- a) afford special protection to the aquatic flora and fauna of such area or part thereof and to protect, preserve and manage the natural breeding grounds and habitat of aquatic life, with particular regard to species of rare or endangered flora and fauna;
- (b) allow for the natural regeneration of aquatic life in such area or part thereof where such life has been depleted;
- (c) promote scientific study and research in respect of such area or part thereof;
- (d) preserve and enhance the pristine state and productivity of such area or part thereof; and
- (e) regulate recreational and other activities in such area or part thereof to avoid irreversible damage to its environment.<sup>147</sup>

Establishment of marine parks is one of the key features of marine ecosystems conservation in Malaysia and marine parks are regulated through the Fisheries Act 1984 and the Establishment of Marine Parks and Marine Reserves Order 1994. Once a particular area of the sea has been declared as marine parks and marine reserve, the following activities constitute an offence under section 43 of the Fisheries Act 1985:

- a) Fishing or an attempt to fish
- b) Removing or taking into possession of any aquatic animal or aquatic plant or part thereof, whether dead or alive
- c) Collecting or taking into possession of any coral, dredges or extracts any sand or gravel, discharges or deposits any pollutant, alters or destroys the natural breeding grounds or habitat of aquatic life, or destroys any aquatic life
- d) Constructing or erecting any building or other structure on or over any land or waters within a marine park or marine reserve

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<sup>146</sup> Preamble, Art. 2(10), 18(4), Rules 7 and 33 of the UNESCO Convention 2001. See chapter 2, para 2.5.2.

<sup>147</sup> Section 41(1) of the Fisheries Act 1985.



- e) Anchoring any vessel by dropping and any kind of weight on, or by attaching any kind of rope or chain to, any coral, rock or *other submerged object* (emphasis added), or
- f) Destroying, defacing or removing *any object, whether animate or inanimate*, in a marine park or marine reserve (emphasis added)

This provision does not specifically make it an offence to remove or destroy underwater cultural heritage but it is submitted that reference to 'other submerged object'<sup>148</sup> or 'any object'<sup>149</sup> sufficiently covers the underwater cultural heritage but further reference to objects whether 'animate or inanimate' object is not particularly useful considering since underwater cultural heritage is not considered as neither 'living or non-living resources'.<sup>150</sup>

For the purpose of regulating activities in areas established as marine parks, the National Advisory Council for Marine Park and Marine Reserve was also established under the Fisheries Act 1984.<sup>151</sup> Its main functions are:

- (a) To determine the guideline for the implementation at the national level with respect to protection, conservation, utilization, control, management and progress of the marine park and marine reserve areas;
- (b) To coordinate the development of any area of a marine park or marine reserve with the Federal Government and any body corporate; and
- (c) To give technical advice to the State Government with respect to any development project on any island which is situated in a marine park or marine reserve area.

The Council consists of a wide representation from various Ministries and governmental departments. At the moment, members of the Councils are from the Ministry of Agriculture, the State government concerned, the Ministry of Finance, the Ministry of Science, Technology and Environment, the Fisheries Department, the

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<sup>148</sup> item (e).

<sup>149</sup> item (f).

<sup>150</sup> See; Chapter 1.

<sup>151</sup> Section 41A and the Fisheries Act 1984.



Department of Wildlife and National Park, the Implementation and Coordination Unit of the Prime Minister's Department, the Malaysian Tourism Promotion Board, the Malaysian Society of Marine Sciences WWF for Nature Malaysia and the Malaysian Nature Society.<sup>152</sup>

The relationship between marine parks and underwater cultural heritage is interesting because, in many cases, shipwrecks do play the role of 'artificial reef' in an otherwise barren sea bed thereby attracting many marine living resources.<sup>153</sup> The relationship between shipwreck and reef or coral reef has been described by some writers as 'the assemblage of aquatic flora and fauna over certain natural sub-tract and artificial reef', and, 'if the assemblage occurs on certain non-natural substract (shipwrecks, concrete blocks etc.) ... any object, given the right depth (60-80 feet) and [depending on] the quality of the waters, [would promote] growth and aggregation of marine, flora and fauna such as coral and fishes as they provide habitats for them to flourish.<sup>154</sup> Consequently, when it comes to in-situ preservation of historic wrecks, it also bodes well for the preservation of natural marine environment and ecosystem as a whole. The recovery operation of the historic wrecks on the other hand, even when carried out according to the standard provided in the Annexed Rules of the UNESCO Convention 2001, does exactly the opposite, and therefore is in contradiction with the main objective of protecting such heritage.

#### **5.8 Legal Mechanisms under the Merchant Shipping Ordinance, the Fisheries Act 1984 and others in light of the 2001 UNESCO Convention.**

The National Heritage Act 2005 remains the most important piece of legislation which has the closest link to the 2001 UNESCO Convention. However, the Merchant Shipping

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<sup>152</sup> Ibid, Section 41A (2)(a-k). Section 41A(2)(l) also provides that the Minister may appoint other member considered necessary from time to time.

<sup>153</sup> Najib Ramli, above, note 125, p. 21.

<sup>154</sup> Ibid.

Ordinance 1952, Fisheries Act 1984 and relevant sub-regulation should nevertheless be looked at as providing support mechanisms as they pertain to certain other issues relevant to the protection of underwater cultural heritage, namely, regulating salvage and other activities incidentally affecting underwater cultural heritage. Although no legal provision is made to exclude the application of the Merchant Shipping Ordinance 1952, the National Heritage Act 2005 has effectively ban salvage of historic wrecks unless it is done with prior approval and licence to salvage or excavate from the Heritage Department. The National Heritage Act 2005 however simply adopts the procedures for the reporting of find and salvage under the Merchant Shipping Ordinance.<sup>155</sup> As such, the National Heritage Act has effectively imported the salvage principles. It is submitted that, it is not the Merchant Shipping Ordinance 1952 which needs review but the new Heritage Act itself as well as the Special Committee Guidelines in approving the excavation or salvage of historic wrecks. Since it is not one of the objectives of the 2001 UNESCO Convention to completely bar the application of salvage laws, what needs to be done is to ensure that the application of such laws do not result in defeating the principles and objectives set in the Convention. The Merchant Shipping Ordinance remains an important and relevant piece of legislation as far the salvage of other type of wrecks is concerned.

It must be recalled that the 2001 Convention calls upon each State to 'use the best practicable means at its disposal to prevent or mitigate any adverse effects that might arise from activities under its jurisdiction incidentally affecting underwater cultural heritage'.<sup>156</sup> Fisheries Act 1984 comes into picture because it regulates other activities, which may incidentally affect underwater cultural heritage such as trawl-net fishing and recreational activities involving marine parks. Trawl-net fishing is regulated

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<sup>155</sup> This has been discussed in chapter 4, para 4.7, pp. 179-183.

<sup>156</sup> Art. 5 of the 2001 UNESCO Convention.

through the zonation system which restricts trawlers with certain gross relative tonnage (GRT) to certain maritime areas as per table 3 below.<sup>157</sup>

Table 3: Zonation System<sup>158</sup>

| Zones | Distance from Shore<br>(Nautical miles) | Boat Capacity (GRT) | Gear                              |
|-------|---|---------------------|-----------------------------------|
| A     | 5 and less                              | -                   | Traditional                       |
| B     | 5-12                                    | 40 and less         |                                   |
| C     | 12-30                                   | 40-69               | Trawl nets<br>and Purse<br>seines |
| C2    | 30 and above                            | 70 and above        |                                   |

As far as marine parks are concerned, at the moment, there is no marine park established which includes underwater cultural heritage site. Its inclusion is not impossible, as the sites in Sabah show, they offer exceptional diving experience. However, the establishment of marine parks cannot be solely relied upon in protecting wrecks sites. Critics argued that marine parks only ‘accorded direct protection to corals and not related ecosystems and habitats’ and that the protection is only ‘applicable to the ecosystems within the marine parks limits.’<sup>159</sup> Although the National Heritage Act 2005 already provides a new mechanism designed for the underwater cultural heritage, i.e., the creation of a protected zone, there should be no reason why an integrated mechanism between various Acts could not be achieved. In addition, fishing and recreational activities are not the only activities which may harmfully affect underwater cultural heritage. More serious harms also come from coastal areas development projects such as reclamation works or resorts development. These developments can

<sup>157</sup> Major issues relating to zonation include encroachment of trawlers into traditional fishing zone, destruction or damage to gears in this zone and decline in fish stocks in certain zones as a result of trawling. There has been no systematic study on the damage done by trawling on underwater cultural heritage sites apart from the survey reports cited earlier in this chapter.

<sup>158</sup> Source; Salleh, I. S. (1998)

<sup>159</sup> See generally; Basiron, M.N., ‘Marine Environment Law in Malaysia: Development and Compliance’, MIMA Occasional Paper (undated); Ahmad, A.R. et al, *Conservation of Biodiversity in Marine parks of Peninsular Malaysia: Review of Institutions and Policies*. Unpublished report for the UNDP-GEF Project on Conservation of Biodiversity in Marine Parks of Peninsular Malaysia, 2000, Kuala Lumpur.

cause land-based pollution or destruction to heritage sites. In this regard, reference should be made to other existing mechanism such as environmental impact assessment under environmental legislation aimed at regulating development projects, particularly the Environmental Quality Act 1974.<sup>160</sup> Therefore, more needs to be done in terms integrating the implementation of relevant pieces of legislation as they would amplify the protection of cultural heritage provided under the national Heritage Act 2005. However, these layers of protective mechanisms do not address and are not designed to deal with a major ongoing concern, that is, commercial exploitation of underwater cultural heritage.

## **5.9 Conclusion**

### **5.9.1 Merchant Shipping Ordinance 1952 and Salvage of Historic Wreck**

There are several conclusions that can be drawn from the above observation. The rules relating to salvage provided under the Merchant Shipping Ordinance 1952 are not designed to cater for underwater cultural heritage, but its provisions, particularly those relating to the duties of the Receiver of Wreck have been applied to all wrecks including the underwater cultural heritage. The reason is that the definition of wrecks as provided under the Merchant Shipping Ordinance covers all wrecks in general and does not make any distinction between historic wrecks and other type of wrecks. The National Heritage Act 2005 contains some provisions specifically dealing with underwater cultural heritage but it does not exclude the application of the Merchant Shipping Ordinance. The new law seems to retain the same position under the Antiquities Act 1976. This position assures the application of the salvage principles,

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<sup>160</sup> The controversial Bakun Reservoir Preparation EIA Report (February 1995) for instance contained description of location and cultural heritage and artefacts to be affected by the project. Other more recent controversies involving developments which are affecting marine parks include those tourism development in Redang island and the building of marine and airport in Tioman island. Following public outcry for the marina development in Tioman, a detailed EIA was prepared to determine the impact of such developments on marine parks.

procedures and other rules relating to the duties of the Receiver of Wreck under the Merchant Shipping Ordinance should any dispute arises before the Court.

Unfortunately, although the Ordinance is designed to protect the interest of various parties such as the real owner, the insurers and the salvor, it fails to address the peculiar need of underwater cultural heritage. Major difficulty arises from the requirement that all wrecks be kept in the custody of the Receiver for a period of one year for the purpose of safeguarding the rights of real owners of the wrecks. Despite its good purpose, it is not clear if this is in harmony with the standards of archaeological practice as parts of the wrecks and artefacts recovered may well disintegrate over time if not properly cared for once brought to the surface. It should be recalled that 'a special characteristics of underwater cultural heritage is the well preserved state of objects and wrecks due to the fact that they are protected by water and undamaged by air'.<sup>161</sup> This problem has also been addressed under the National Heritage Act 2005 by transferring the duty of the Receiver to keep custody of the wreck to the Heritage Commissioner.

Although some experts from the salvage industry argued that the application of salvage law need not necessarily be incompatible with other laws purporting to protect the underwater cultural heritage,<sup>162</sup> in view of the possible ratification of the 2001 UNESCO Convention by Malaysia, salvage laws including the application of the Merchant Shipping Ordinance over underwater cultural heritage needs some restraint. The dearth of case laws affecting underwater cultural heritage in Malaysia also makes it difficult to assess the effectiveness of the Merchant Shipping Ordinance in relation to underwater cultural heritage. It is also unfortunate that this study could not benefit from examining the only case on the subject arbitrated at the Kuala Lumpur Regional

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<sup>161</sup> See; Report by the Director-General on Action Taken Concerning the Desirability of Preparing an International Instrument for the Protection of the Underwater Cultural Heritage (UNESCO Doc. 29C/22 5 August 1997) Annex 1 Para 5 and Annex 2 Para 4.

<sup>162</sup> Cross ref to Chapter 2, p. 37 (letter of the President of CMI).



Centre for International Arbitration in 1999 relating to the disputes between the Government of Malaysia and the appointed salvage company on the wrecks of Diana over the distribution of profits or artefacts between the parties.<sup>163</sup> Both parties to the disputes refused to allow access to documents for the purpose of the present studies.<sup>164</sup> Other than this, there is no modern jurisprudence developed in Malaysia on salvage of historical wrecks.

Salvage works affecting underwater cultural heritage found at sea normally involves a joint-venture between the Government and a private Salvage company, so much so that problems relating to ownership claims of underwater cultural heritage are generally avoided. The partnership is governed by agreements and through specific profit sharing clauses. However, this does raise the issue of commercialisation of underwater cultural heritage, which is in complete discord with the main objective of protection under the 2001 UNESCO Convention. The Director General of the Department of Museum and Antiquities, Dato' Dr. Adi Hj Taha,<sup>165</sup> has once rejected the use of the word 'commercialisation' of such national heritage but instead justified government involvement as the act of 'commissioning' salvage projects in order to save those heritage from further and more grave losses. The attitude of the the past and present heritage authority in classifying the underwater cultural heritage into heritage which are of no direct link to the country and those which do have cultural and historical link to the country is simply not acceptable as it ignores the value of underwater cultural heritage as 'common heritage of mankind'.

The Merchant Shipping Ordinance 1952 needs to be reviewed to extent that it does not conflict with current legal position under the National Heritage Act 2005, preferably by

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<sup>163</sup> Hillary Chew, the STAR, 2000.

<sup>164</sup> Email correspondence with Dato' Noorashikin from KLRCA dated June 2004.

<sup>165</sup> Then the Deputy Director General of the Department of Museum and Antiquities, Malaysia

excluding its application over historic wrecks as what is done in Australia. The main objective of salvage law is to provide rules on assisting 'vessels in distress' and to save property and life from suffering further damage or from being lost permanently. This is why the law gives certain possessory rights and provides certain guarantee incentives and reward mechanism in consideration for successful salvage operations undertaken by the salvors. However, the salvage operations of historic wrecks are not operated within the context of saving 'vessel in distress' and it is certainly not within the context of saving properties from further damage.<sup>166</sup> In the absence of any clear provision excluding the application of the principles of salvage and other rules pertaining to the determination of dispute, determination of reward for salvage services, valuation or property and so on, it would seem that these rules would still be applicable to historic wrecks.

The lack of a workable legal solution in the Ordinance itself is apparent from the decision of the Cabinet to establish the National Committee on the Management of Historical Wrecks in 1988 since it is beyond the scope of duties and powers of Receiver's of Wreck to consider salvage projects relating historic wrecks. Since the Merchant Shipping Ordinance 1952 does not make any distinction between types of wrecks, whether historic or otherwise, it will continue to be applicable towards historic wrecks. The extensive 'salvage and wrecks' provisions on salvage operations clearly show that the law focuses more on the rights and duties of a salvor and the Receiver in relation to salvaging a vessel in distress and other matters connected to it. Salvaging historical wrecks on the other hand is obviously not technically a matter of assisting a 'ship in distress'. Rather, it is a quest for the recovery of a vessel that has long sunk on the seabed. While the Merchant Shipping Ordinance 1952 rewards a salvor for successful salvage operations (to assist ship in distress), it does not provide any rules or

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<sup>166</sup> The wrecks may however need to be saved from further damage by remaining in the sea and on the site.



guidance for salvage works undertaken in view of recovering of historical and or archaeological artefacts.

### **5.9.2 Other Legislation on Fishing and Marine Parks**

Various other laws relating to the regulation of fisheries as well as tourism related activities involving marine parks such as wreck diving are already in place and could well be coordinated with future development of laws specifically designed for the protection of historic wrecks. The main issue rests on the coordination and integration of established protective framework with recent changes brought under the National Heritage Act 2005. The administrative governance of marine resource conservation and exploitation in Malaysia takes the form of multilevel institutional arrangement. This is as a result of the three-tier system structure i.e. Federal, State and Local Government. This arrangement, although a normality in a Federal type of governance, has been criticised as being overly complicated for its implementation involves as combination of several governance levels as well as a myriad of policies, legislation, by-laws and guidelines.<sup>167</sup> It remains to be seen how further regulations relating to the establishment of protected zones could be integrated with marine parks in Malaysia as these distinct maritime areas share some common goals, particular in preventing unlawful human interferences.

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<sup>167</sup> Ibid, p. 22.

### CONCLUSION

#### 6.1 Overview of Research Findings

The research was conducted as a result of the uncertainty behind the government position regarding the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage. The research was also conducted during the time when the government was still reviewing the framework of laws relating to cultural heritage protection including the underwater cultural heritage. Against these two main issues, the objectives of this research were as follows:

- (a) To examine the substantive aspects of the laws as enunciated under the 2001 UNESCO Convention in order to examine whether the hesitant attitude of the Malaysian government to ratify the Convention is well justified or whether it is just as a result of lack of political will. This thesis submits that the attitude of the government remains, to some extent, comfortable in observing the responses made by the international community on the subject before making any definite stand particularly those of its neighbouring countries such as the Republic of Indonesia. Ratification of any international convention will only usually be done when the laws have been updated or amended to meet the requirements of the convention or treaty. For instance, 1982 UNCLOS was only ratified by Malaysia in 1996 years following two implementing legislation; the Fisheries Act 1984 and Exclusive Economic Zone 1984. As in chapter 2, however, one must draw attention to the contents of the recommendation of the Special Workshop,<sup>1</sup> which specifically recommended to the Government to reconsider its 'initial'

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<sup>1</sup> Ch. 2, para 2.1.1.

position regarding the Convention. The recommendations include among other things, the objection to certain articles of the 2001 Convention which were felt to be inadequate to deal with 'national security' interests. Considering that the Recommendations were authored and strongly supported by various government departments, including the Department of Hydrography, this thesis concludes that the government was not 'fully' advised of the implications of the Convention during the negotiation process of the Convention. This is compounded by the inability of certain government representative (particularly then the Department of Museums and Antiquities) to defend the overall stand taken by the government in Paris in 2001. Therefore, subject to revisit of relevant articles by the International and Advisory Division, the Government is unlikely to take steps to ratify the Convention in the nearest future.<sup>2</sup>

- (b) In addition, this research also sought to examine, whether the laws at the domestic level adequately provide the necessary legal protection for the underwater cultural heritage. Although the 2001 UNESCO Convention is an international Convention designed to deal with underwater cultural heritage issues over various maritime waters beyond the inland waters of the Coastal State, it has direct a bearing over inland waters as the Annex Rules of the Convention serve as the best standard practice in underwater maritime archaeology. Consequently, domestic legislation was studied in the light of the 2001 UNESCO Convention, in order to determine whether they are in line with the objectives and principles of the Convention. As will be further elaborated below, this research finds that current laws and government practice over underwater cultural heritage do not adequately address the concerns sought to be dealt with under the 2001 Convention. While the new law includes a special section on underwater cultural heritage, the contents of the law fails to address

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<sup>2</sup> These issues will be elaborated in the following paragraphs, particularly under para 6.2 on research findings.

certain important issues such as the prohibition of commercialisation of such objects. This thesis also submits that, in addition to this uncertain and confusing stand of the Malaysian government as mentioned above,<sup>3</sup> the existing 'priority' in cultural heritage governance in Malaysia, is also a possible obstacle as far as the underwater cultural heritage is concerned. In the years since Malaysia's acceptance to the 1972 Convention on World Cultural and Natural Heritage, much focus has been made on listing of the Mulu and Niah Caves in 2000 as well as the recent listing of Historic City of Malacca on the UNESCO World Heritage list in 2008.<sup>4</sup>

In finding answers to the questions presented above, the researcher faced difficulty in ascertaining the official views of the relevant government departments. For instance, no substantial explanation could be obtained from either the Department of Museums or the Heritage Commissioner regarding the government stand on the 2001 Convention during its negotiation process. The former was the main representative for the government during the negotiation of the 2001 UNESCO Convention but was unable to provide further explanation, possibly as a result of the criticism levelled against them at the special workshop. A query with Malaysia's UNESCO office also received no response whatsoever and another inquiry with the International and Advisory Division of the Attorney General Office also revealed very little insight. This lack of response is a clear indication that the government is in an uncertain position and is reconsidering its 'initial' position regarding the 2001 Convention. Most of the information relating to underwater cultural heritage recovery practices in Malaysia was gathered during interviews and special workshop, seminars, books and reports. As far as legislation development is concerned, it was extremely hard to keep track of the development as

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<sup>3</sup> para 6.1(a).

<sup>4</sup> These will all be elaborated under para 6.2 of research findings.

most information was kept confidential and there was generally no public consultation involved in the drafting of the new legislation.

## 6.2 Research Findings

### 6.2.1 State of Maritime Archaeology in Malaysia

Statutory development relating to underwater cultural heritage should be understood in the light of Malaysia's state of maritime and underwater archaeology. This research finds that, although there is an increased understanding of the importance and place of underwater cultural heritage as part of national heritage, maritime archaeology itself as a discipline is still at its infancy in Malaysia. The Department of Maritime Archaeology was only recently established with only one government archaeologist sent for training in underwater archaeology since the adoption of the 2001 UNESCO Convention. The success enjoyed by the Department of Museums in the recovery projects of historic wrecks including the *Diana* have also involved the aid of private commercial salvage company. However, not all of these partnerships resulted into fruitful endeavours as reflected in the dispute between the government and the salvage company over the alleged distribution of artefacts recovered from the wreck of *Diana*. This case proved the ugly side of the relationship between the archaeological and economic motivation behind the recovery. Many of the artefacts recovered from the *Diana* wreck ended up in auction in Amsterdam although it was reported that the government managed to repurchase some of these artefacts. In archaeology, it is vital that these artefacts are preserved and documented in their historical and cultural context. Through partnership with these private companies, universities and the Department of Museums, fortunately, most of underwater cultural heritage, which have been surveyed or excavated have also been properly reported and documented. Some of the wrecks sites have also been turned into training ground for maritime underwater archaeology in Malaysia.<sup>5</sup> The young archaeologist who was sent for specialised

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<sup>5</sup> See; Ch. 3 and 5.

training in maritime underwater archaeology is now involved as representative of the maritime archaeology unit of the Department of Museums and the Heritage Department in recovery projects.

At the institutional level, the establishment of the Heritage Department after the cabinet reshuffling in April 2004 was an important change in heritage governance in Malaysia. Dato' Seri Utama Rais Yatim was the Minister responsible for the drafting of a stand-alone legislation on the protection of cultural heritage. Significant institutional changes introduced under the new Act include the establishment and appointment of the Commissioner of Heritage, the creation of a National Heritage Register, Heritage Fund as well as the establishment of a Heritage Council. The Commissioner for Heritage has wide powers and numerous duties under the new Act. In relation to underwater cultural heritage, the Commissioner holds the power for the establishment of protected zone and takes over the responsibilities of the Receiver of Wrecks. The new law also empowers the Commissioner to deal with heritage objects 'in accordance' with the new law. However, at the present, the Commissioner has too wide a power and numerous responsibilities to shoulder. Since coming into post in 2004, 50 national heritage objects have been listed in the Heritage Register but none so far included the underwater cultural heritage. It makes one wonder, though not explicitly made known to the public, whether the heritage commissioner is prioritising certain heritage issues compared to others,<sup>6</sup> considering the numerous heritage issues faced by the Commissioner.

One issue relating to the management of the underwater cultural heritage remains unclear. While the National Heritage Act 2005 provides for the establishment of a Heritage Council, who advises the Commissioner for Heritage and the Minister of Arts,

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<sup>6</sup> See further conclusion below regarding the creation of protected zone, para 6.2.2(b)(ii), pp. 264-265.

Culture and Heritage on issues relating to cultural heritage protection, the previously existing National Committee on the Management of Historic Wrecks is not clearly placed or established under the new law. Pursuant to the establishment of the Committee in 1988, any proposal for the survey or recovery of an underwater cultural heritage must be submitted to the Director-General of the Department of Museums, who will vet the application and forward it to the National Committee on the Management of Historic Wrecks if he or she thinks the project is worth pursuing. This seems to be the practice, still, as there are no new changes introduced under the new Act and no clear explanation was given by the relevant government as to why the Committee was not properly established under the new Act. One gets the impression that the Heritage Council takes assumes the responsibility of the former. In practical terms, the Committee seems to be comprised of slightly different membership than that of the Heritage Council, reflected in their expertise and vested interest on the subject. In addition, it can also be concluded that the same remains; that the new law does not clearly provide that the State or Federal government could initiate the submission of a proposed survey or recovery project.

Other issues such as the creation of a heritage fund will undoubtedly inject some life to the development of maritime archaeology in Malaysia, although, it must be said that such funds will probably be channelled towards projects that will promote heritage laden tourism activities or projects. As seen under the 8<sup>th</sup> and 9<sup>th</sup> Malaysia Plan, more strategies and funds are channelled towards this industry although maritime archaeology itself is not a huge tourism product under the government plan. The semi-permanent maritime archaeology museum, which was located next to the national museum complex, was first open in 2001 and was well appreciated by the public. The exhibition undoubtedly has created awareness amongst the public regarding Malaysia's underwater cultural heritage, which otherwise would only be the topic of discussion among archaeologists, museums administrators and university teachers. The



museum however was closed down recently in order to be moved to another location outside the city. It is not clear if the semi-permanent museum would eventually turn into a permanent museum.

## **6.2.2 Statutory Development Relating to Cultural Heritage Protection in Malaysia**

### **(a) The legal position prior to the National Heritage Act 2005**

There are two phases in Malaysian history that form significant part of the development of laws relating to the protection of cultural heritage in Malaysia. The first phase is the period prior to independence of Malaya and the subsequent formation of Malaysia. Two significant developments could be attributed to this phase. The first was the ancient laws of Malacca, i.e., the Malacca Maritime Code.<sup>7</sup> It is interesting to note the role remarkable played by Malacca in the maritime trading history and that a study of the relevant provisions in the Malacca Code revealed the existence of legal mechanism relating to the discovery of treasures at sea as well as the discard of cargoes in the event of emergency at sea. However, there was no evidence showing that these laws or other similar laws were applied to other parts of the Malay States (now forming the West Malaysia). However, as concluded in chapter five, the Malacca Code had been disused prior to the time of British occupation and therefore its relevance to the development of modern salvage laws such as the Merchant Shipping ordinance 1952 is not of much significance.<sup>8</sup> Attention was also given to the various pieces of legislation of the Malay States, particularly the Kedah Land Law, which contained provisions relating to treasure troves. However, as noted in chapter four, these laws provided little guidance on the protection of underwater cultural heritage as a regime.<sup>9</sup>

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<sup>7</sup> Ch. 4, para 4.1.2, pp. 144-147.

<sup>8</sup> Ibid, also; Ch. 5, para 5.2.1, pp. 202-203.

<sup>9</sup> Ch. 4, para 4.1.3, pp. 148-149

In the span of 50 years since independence, however, Malaysia has had three major statutory developments in the field of cultural heritage protection. The first was the Antiquities and Treasure Trove Enactment 1957, which was repealed by the Antiquities Act 1976 except the part pertaining to the Treasure Trove. These two statutory developments did not provide for or increase the level of protection of underwater cultural heritage as it was only in the mid 80s that underwater cultural heritage were first discovered in any of the Malaysian maritime waters and they were understood by many only as 'historic wrecks' or 'sunken treasures'. In addition, it was also generally felt by heritage administrators that there was no need for specific laws catering for underwater cultural heritage mainly due to the understanding that the Antiquities 1976 already contained a definition of 'antiquities', which was intended to cover all historical and cultural objects situated both on terrestrial as well as on the seabed.

As shown in chapter 4, previous legislation was essentially a general antiquities legislation, which heavily focused on the conservation and preservation of terrestrial built historical and cultural environment. Arguably, although references to archaeological and historical objects found on the seabed in the definition of antiquities under the previous law could be interpreted as covering underwater cultural heritage, the mechanism of control for the preservation, conservation and exploitation of the heritage, seemed only to deal with terrestrial aspects of cultural heritage protection. Major mechanisms of protection focused on the preservation or maintenance of built historical environment, the establishment of terrestrial archaeological reserves which served a distinct 'natural' heritage purpose as opposed to 'cultural' heritage purpose and the protection of objects of antiquities and monuments, with little or no bearing to the special concerns of underwater cultural heritage. It did not deal, for instance, with the question of ownership of an underwater cultural heritage, which was simply left to be determined through the application of the Merchant Shipping Ordinance 1952. Furthermore, it also did not deal with question of in situ preservation of underwater

cultural heritage and did not prohibit commercial exploitation of underwater cultural heritage. As shown in chapter 3, there is obvious conflict between the 2001 Convention's objective of prohibiting commercial exploitation of underwater cultural heritage and the Special Committee Guidelines on sale and distribution of archaeological artefacts recovered during salvage. The only useful mechanism was the imposition of export control of cultural objects to another country. However, there was no control over the import of cultural objects into the country.

In addition, the law was only extended to outer breadth of the territorial waters and did not cover other maritime zones beyond that. Both the Exclusive Economic Zone Act 1984 and the Continental Shelf Act 1964 also did not address these issues.

One could find more useful guidelines to protecting underwater cultural heritage *in situ* under the Fisheries Act 1985 as far as creation of marine parks are concerned, since, arguably, as shown in Chapter 5, submerged wrecks could provide a suitable habitat for the living marine environment. However, the Act as it currently stands does not empower the relevant authority, i.e., the Fisheries Department, to include underwater cultural heritage as one of such factors for consideration in establishing marine parks. Furthermore, no study has been undertaken by the Fisheries department on the role of wrecks site as a natural habitat for the living marine environment although such possibility had been envisaged by the officials concerned.

#### **(b) Significant Changes Introduced under the National Heritage Act 2005**

The third statutory development is the National Heritage Act 2005 which repeals the The Antiquities Act 1976. The new Act came into force on 30 March 2006. The new Act is no doubt a cornerstone towards better cultural heritage governance including underwater cultural heritage in Malaysia. Not only the new Act brought about some major institutional changes in heritage governance in Malaysia, it also provides for new

mechanism of control over activities relating to the underwater cultural heritage which were vague and insufficient under the previous Act. The following sections summarise major changes introduced under the new Act in relation to the protection of underwater cultural heritage and conclude that, while some of these changes sufficiently respond to the issues addressed in the first objective set out above,<sup>10</sup> i.e. vis-à-vis the principles and objectives of the 2001 UNESCO Convention, others remain vague and unresolved.

(i) *NHA broadens the scope of 'cultural heritage' protection and defines 'underwater cultural heritage'*

The new legislation contains a comprehensive definition of 'cultural heritage', which includes both tangible and intangible aspect of cultural heritage protection and includes the underwater cultural heritage. The new law thus broadens the scope of cultural heritage protection in Malaysia throughout the Federation. The definition of underwater cultural heritage under the Act clearly adopts the 2001 UNESCO Convention's definition of the same. According to this definition, underwater cultural heritage includes not only historic wrecks, but also a wide spectrum of 'traces of human activities' which have become submerged, whether 'partially or totally under water, periodically or continuously, for at least 100 years.'<sup>11</sup> The government's decision to provide mechanisms of control for 'underwater cultural heritage' instead of for 'historic wrecks' was a decision in line with the objective of the 2001 Convention, i.e., to protect of underwater cultural heritage in its widest sense. The definition of the term, under the new law, however, possibly contains at least one confusing element. While the Convention adopts the phrase 'archaeological and historical *character*' in determining whether an object qualifies as an underwater cultural heritage, the actual test applied under the new law is the 'cultural heritage *significance*' test. As seen in

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<sup>10</sup> Above, para 6.1, pp. 254-255.

<sup>11</sup> Ch. 2, para 2.2.2, pp. 42-57.

chapter 2, legal experts have expressed doubt whether the word 'character' is of any practical use in determining the status of objects and most tend to support the application of 'significance' test over 'character'.<sup>12</sup> The latter is probably of too wide in meaning for administrative purposes. In addition, while objects of 'antiquities' are regarded as such once attaining the age of 50, the age requirement for underwater cultural heritage is up by 100 percent. Clearly, the latter requirement attempts to conform to the 2001 UNESCO Convention. In both situations, however, one can find no scientific justifications.

*(ii) NHA provides for the establishment of protected zone*

One of the major weaknesses under the previous legislation was that no provision was made on the in situ preservation of an underwater cultural heritage leaving the impression that the law was essentially one that only facilitated the determination of ownership, recovery control as well as control of movement of cultural objects . One such mechanism to promote in situ preservation and in particular to control activities affecting underwater cultural heritage would be through the creation of a special zone protecting the heritage as well as its site. The Fisheries Act 1984 does provide for the creation of marine parks but the powers of the Director of Fisheries Department does not clearly include historic wrecks or underwater cultural heritage. The Antiquities Act 1976 on the other hand provided for the creation of archaeological reserves but such zone clearly serves a distinct purpose on its own and it was designed to deal with inland areas as opposed to maritime zones. National Heritage Act 2005 currently empowers the Minister to declare a 'protected zone', an area upon which an underwater cultural heritage is situated, upon the advice of the Heritage Commissioner. Once the zone is established, no activities may be conducted in the area except with the express written permission from the Heritage Commissioner. However, further regulations pertaining to the nature of activities to be prohibited in the zone or

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<sup>12</sup> Ch. 2, pp. 56-57.

other special measures have yet to be drawn up by the relevant government department. Currently, there is yet news of any definite plan to establish the first protected zone in Malaysia. Consequently, how the creation of this protected zone will affect other lawful use of the ocean, cannot be determined at this juncture. In principle, major users which might be affected are the fishing community and possibly scuba wreck diving. The fishing community interest and needs, as discussed in chapter 5, need to be considered more carefully before a protected zone is established in otherwise lawful fishing area since from the experience of the Fisheries Department, it is a sensitive issue and affect the livelihood of traditional fishermen. In addition, one such issue that was raised during the Special Workshop to consider the 2001 UNESCO Convention was the need to educate the fishing community on the significance of underwater cultural heritage. Fishermen often discovered such objects by accidents and were often approached by treasure hunters who are willing to pay them in exchange for information on the location of such objects.

*(iii) NHA introduces new reporting duty over discovery of wrecks*

The Act imposes obligation on anyone who found objects or sites of underwater cultural heritage to report such finding to the Commissioner for Heritage or the nearest Post Officer. The imposition of this new duty is designed to deal with problems of not only illicit looting but extended to all acts of giving information to middle man seeking information pertaining to location of possible historic wrecks location. The wording of the provision is clear in that the duty to report such discovery exists even when the act of discovery itself is not followed with the intention to recover such objects. The penalty is set at RM50,000 or imprisonment or both.

*(iv) NHA determines question of ownership and possession during salvage operation*

Issues relating to the custody, possession and control of moveable underwater cultural heritage and the ensuing question of ownership during salvage and excavation have now been resolved under the Act by adopting the the main features of legal mechanism already existing under the Merchant Shipping Ordinance relating to such issues. As discussed above, the law imposes a duty on the finder to report discovery to the Commissioner for Heritage, previously the receiver of Wreck, or to the Port Officer who will then transmit information to the Commissioner. The Commissioner, again, previously the receiver of Wreck, will keep custody of underwater cultural heritage while ownership of underwater cultural heritage is resolved in the period of one year from the date of custody. This is thus essentially a taking over of the function of the Receiver of Wreck by the Heritage Commissioner, the latter being the person well suited with knowledge and expertise to deal with the heritage whilst in his or her custody.

*(vi) NHA regulates dealings with underwater cultural heritage*

The relationship of the new legislation with the Merchant Shipping Ordinance is an obvious issue. However, the relationship is not defined under the National Heritage Act 2005. The Merchant Shipping Ordinance 1952 essentially deals with wrecks and salvage in general, specifically drafted to deal with salvage and disposal of wrecks based on economic consideration. Under the Ordinance, the Receiver of Wreck is empowered to take possession of the wreck as a mechanism on ensuring that any unclaimed wrecks will remain with the Federal government ownership but his duty is in relation to wrecks in general and issues relating to the protection of underwater cultural heritage are only incidental to his main functions. The requirement under the Ordinance that the Receiver will keep possession of historic wrecks for a period of up



till one year before he could dispose of the wreck as he or she deems fit is not conducive for the preservation of any artefacts associated with the wreck in question. As mentioned above, the National Heritage Act addressed this problem by empowering the Heritage Commissioner to take possession of the wreck, for a period of one year to allow any owner to make claims subject to salvage fees and other expenses. Unlike the Receiver of Wreck, who is not trained in archaeology, the Heritage Commissioner will be able to take specific and archaeologically suitable measures relating to conservation or preservation of any part of the underwater cultural heritage whilst in custody of the same. With the shift of the role to the Commissioner of Heritage, there needs to be clear guidance as to whether the new law excludes the application of the Merchant Shipping Ordinance. The new law is silent on this issue. In comparison to the provisions of the National Heritage Act 2005, the provisions of the Merchant Shipping Ordinance are still far more detailed on questions such as handling of wrecks and on the question of apportionment of salvage. In this respect, one may be tempted to look at the Merchant Shipping Ordinance for guidance should there be a need to interpret certain legal provision under the National Heritage Act.

*(vii) Offences and Penalty*

The new Act also provides for the imposition of penalty or imprisonment for offences committed relating to underwater cultural heritage. Such offences include failure to report discovery of underwater cultural heritage as noted above, and others, offences against heritage site, or those relating to possession, custody or control of moveable underwater cultural heritage, offences committed in protected zone, as well as failure to comply with terms and conditions imposed for survey, salvage or excavation works. It should be noted the amount of penalty and imprisonment imposed for commission of these offences are considerably higher than those imposed under previous Act. For example, there is a general penalty upon conviction for the amount of fifty thousand

ringgit or imprisonment of not exceeding five years or both and additionally, for subsequent conviction, an amount of one hundred thousand ringgit or imprisonment for a term not exceeding ten years or to both. It is hoped that severe much more severe penalties would deter the commission of those offences. No prosecution has been made until today.

**(c) Unresolved Issues under the National Heritage Act 2005**

Should the government proceed to seriously consider the ratification of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, the issues summarised below need to be addressed more fully by the government in order to bring domestic legislative measures in line with the objectives and principles of the 2001 Convention.

**(i) *The relationship between National Heritage Act 2005 and MSO 1952***

Although the new Act expressly prohibits any recovery, salvage or excavation of the underwater cultural heritage without license i.e. without first having obtained written permission of the Heritage Commissioner, the new Act does not expressly exclude the application of the Merchant Shipping Ordinance 1952. It is submitted that although total exclusion is not necessary since the 2001 Convention allows for the application of salvage law if authorised by the government and if in conformity with the objectives of the Convention, it would erase confusion in the present framework of laws. After all, no major changes were made to the present system of salvage determination except that the duty relating to the custody and dealing of underwater cultural heritage during and after salvage, previously shouldered by the receiver of Wrecks, is now shouldered by the Heritage Commissioner.

*(ii) Reporting and Handing Over of Underwater Cultural Heritage*

Under the new law, a finder is required to report recovery of underwater cultural heritage to the Heritage Commissioner (in the past, to the receiver of Wrecks, under the MSO 1952) and whenever possible to bring forth the objects to the Commissioner. This is clearly still a salvage law mentality that perceives underwater cultural heritage as some kind of treasures that must be removed from the sea or its site. At the same time, it is clear that no recovery of underwater cultural heritage may be carried except upon being approved and granted licence to do so by the relevant authority.

*(iii) Prohibition of Commercial Exploitation*

The new Act does not prohibit commercial exploitation of underwater cultural heritage. In fact, the new law clearly provides for certain mechanism for dealing with the heritage. While the law provides for the power of Commissioner of Heritage to purchase heritage objects of national significance from a private owner and that a private owner may only sell a heritage object after the Commissioner for Heritage being satisfied that the object is not of national significance, nothing is said on the 2001 UNESCO Convention principle that underwater cultural heritage shall not be commercially exploited. It is widely known to the negotiators of the 2001 UNESCO Convention that one of the main objectives at the heart of the Convention was the prohibition of commercial exploitation of the heritage. While the new Act expressly imports the definition of the term underwater cultural heritage as used under the 2001 UNESCO Convention, issues relating to the commercial exploitation of the heritage are left ambiguous. A visit to the National Museum gift shop will show that many remnants of ceramics blue and white china recovered from certain historic wrecks have been turned into and sold as small pendants, trinkets and souvenirs. Of course, question of commercialisation is still the subject of debate and many experts have argued that certain activities of commercial nature may not necessarily go against the objective of prohibiting commercial exploitation but the government needs to come up

with clear policy on the issue. Commercial activities run by government institutions such as museums should not send the wrong signal to the public, who is the beneficiary of the heritage, that the heritage is merely commercial goods.

*(iv) In Situ Preservation*

In addition, the language of the provision of the new Act is also weak in terms of promoting the in situ preservation of underwater cultural heritage. Under the 2001 UNESCO Convention, clearly, in situ preservation is the first option in dealing with the underwater cultural heritage whenever possible. The National Heritage Act 2005 however only provides that the Commissioner *may* decide on in situ preservation. This is an issue that the relevant government is still working on in terms of further sub-regulations pertaining to the creation of protected zone under the new law. In addition, the current Coastal Zone Management Plan also needs to be reviewed to take into accounts changes that are brought about by the new law in areas affecting the management of various maritime zones in Malaysia. Currently, the Coastal Zone Management Plan document does not provide any clear guidance on the issue.

### **6.2.3 Malaysia's Commitment on the International platform on the Protection of Underwater Cultural Heritage**

United Nations Convention on the Law of the Sea 1982; the government ratified this Convention in October 1996 and its commitment on the protection of underwater cultural heritage located in the various maritime zones to which it exert control must be viewed from the perspective of this major Convention, notably, the legal regime provided under article 303 and 149 of the Convention. Despite the uncertainty rife in reading these articles, they do provide the basis for steps taken by States in protecting the underwater cultural heritage in the maritime zones specified. In its declaration upon ratifying the Convention, the government noted that no archaeological and historical objects should be removed from maritime zones within its jurisdiction.

However, none of the legislation which control activities directed at underwater cultural heritage, including the repealed Antiquities Act 1976 as well as NHA 2005, apply beyond the territorial waters of Malaysia. Other legislation which extend beyond the territorial waters such as the Exclusive Economic Zone Act 1984 and the Continental Shelf Act 1965 refer to exploitation of natural resources and do not cover objects of underwater cultural heritage.

As long as the 2001 UNESCO Convention is not yet in force, any dispute relating to the underwater cultural heritage must be resolved in the light of the thin legal regime provided under UNCLOS, that is, every State part to the Convention has the duty to protect the finite heritage from scrupulous treasure hunters. Although the Convention is viewed by many as inviting the ruthless application of salvage law, it is the responsibility of coastal States to ensure that such heritage is well protected by extending relevant heritage laws to all maritime zones established under UNCLOS. This does not necessarily have to be achieved through the creation of cultural heritage zone although this has been done by a number of States. Therefore, it is important to appreciate why the thin legal regime under UNCLOS need to be amplified either through bilateral or other multilateral agreement among States. The progressive development of the international legal regime protecting the underwater cultural heritage has gone through a painfully long process. Its development should not be sabotaged by the lack of political will of States to interpret the relationship between the 2001 UNESCO Convention and the 1982 UNCLOS in a positive light. The thesis maintains that the relationship between the two is one of 'integration' not of 'fragmentation', and after all, 'UNCLOS is not a separate or self-contained legal regime', which means that 'it must be interpreted and applied in accordance with the normal rules of treaty law, including those which allow other agreements and rules of

international law to be taken into account.<sup>13</sup> Thus, States' bona fide commitment as heritage trustees is crucial in promoting a positive development in the legal regime.

The Convention for the Protection of the World Cultural and Natural Heritage 1972 is perhaps the most universal international convention which offers the broadest coverage of heritage issues ranging from the natural and the cultural context. Malaysia is a party to this Convention, however, so far, only 2 natural heritage sites have been listed under the World Heritage Convention; the Mulu and Niah Caves in Sabah and Sarawak in the year 2000. Previous attempt to list Malacca as historic city and a few other natural heritage sites failed. However, the 1972 Convention does not specifically deal with underwater cultural heritage, thus, offering no practical solution towards issues relating to the underwater cultural heritage. Another international convention to which Malaysia is a party to is the 1954 UNESCO Convention on the Protection of Cultural Property in the Event of Armed Conflict. With only two international conventions under its commitment, Malaysia's stand towards ratifying the 2001 UNESCO Convention is thus an important step towards the good management of cultural heritage its wider sense. At the regional level, Malaysia is also a member of the ASEAN Declaration on the Protection of Cultural Heritage 2000. This Declaration contains several mechanisms promoting the conservation and preservation of cultural heritage in the widest sense. It does not specifically provide for ASEAN cooperation on underwater cultural heritage although some provisions can be read to promote cooperation in this area. This Declaration is merely inspirational in nature as it is a non-binding international legal instrument. Its main impact on the domestic legal development is in the inclusion of intangible heritage issues as part of the protection of cultural heritage under the National Heritage Act 2005.

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<sup>13</sup> Boyle, A., 'Further Development of the Law of the Sea Convention', *Int'l. Comp. L. Q.* (2005), p. 565-566

Principal international convention on the subject is the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage. Malaysia voted in favour of the adoption of this Convention, however, currently the International and Advisory Division of the Attorney General Chambers is unable to confirm whether or not Malaysia will proceed to ratify the Convention. No published information could be gathered to justify the government stand in Paris. If anything, report and recommendations of the special workshop organised the Department of Museum in 2002 showed lack of understanding and agreement amongst certain officials of government departments on the stand taken by the government in Paris. The Department of Museums, which was the government representative during the negotiation of the 2001 UNESCO Convention, offered no defence to criticism levelled against them during the workshop. It is understood that the Government's attitude on the subject is to further observe other States' ratification response to the Convention. This was partly as a result of the Recommendation made during a special workshop, which among other things recommended the government to reconsider its position and not to proceed with the ratification of the Convention. Such development reflects a state of confusion even among experts in the government departments as to the actual legal implication of the 2001 UNESCO Convention to Malaysia's commitment and obligations, particularly those vis-à-vis the country's commitment under the 1982 UNCLOS. The Department of Marine was particularly critical of the Department of Museum for failing to consider national and security interests over the nature of foreign involvement in the Exclusive Economic Zone. This position taken by the Department of Marine clearly supports the very reasons why major maritime countries such as the United States of America or the United Kingdom, either objected to or abstained from voting in favour of the Convention.

In addition, the geographical outlook of the South China Sea and the Straits of Malacca in East Asia is a great influence in shaping the geopolitical relations and maritime



concerns in Southeast Asia. Issues relating to maritime delimitation arising out of 1982 UNCLOS become highlights of the jurisdictional maritime issues in Southeast Asia. Instances of such claims within the region are the Spratly Islands Dispute involving various States such as China, Taiwan, Philippines, Brunei, Vietnam and Malaysia, as well as bilateral disputes such as over the Pulau Batu Puteh between Malaysia and Singapore and the Sipadan between Malaysia and Indonesia. Other than these issues, there are also possible conflicts in the management of the semi enclosed areas such as the dispute over the Land Reclamation case between Malaysia and Singapore. It is against the sensitivity over territorial and jurisdictional issues in these cases that the special workshop calls upon the government to reconsider its position relating to the 2001 UNESCO Convention. No further information or clarification could be obtained from the International and Advisory Division on this issue at the moment.

### **6.3 Recommendations**

In the light of the above findings, and in the light of a possible ratification of the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage, this thesis makes the following recommendations in providing a better legal regime protecting Malaysia's underwater cultural heritage whether within or beyond its maritime zones. These recommendations are sub-divided into two main issues corresponding to objectives of research outlined at the beginning of this chapter.

#### **6.3.1 Recommendations relating the stands taken by the Government regarding the 2001 Convention**

To remain in status quo is not a bona fide intention to respect the 2001 UNESCO Convention. Although nothing would compel a State to ratify a Convention unless it consents to it, a vote in favour of its adoption in Paris on 2<sup>nd</sup> November 2001 means there is a moral obligation to take certain measures to respect it. One of the major concerns expressed by the relevant government department was that of 'unlawful

military activities' masquerading as underwater cultural heritage operations in Malaysian maritime zones is not a cogent reason for justification to not ratify the Convention. Existing legal mechanism regulating foreign marine scientific research in the exclusive economic zone of which the Exclusive Economic Zones Act 1984 is the implementing Act for the 1982 UNCLOS, provide guidance on how foreign activities directed at underwater cultural heritage can be regulated. It is important that all States participating in such activities create an atmosphere of trust and cooperation by providing all relevant information regarding the activities and by providing opportunity to the host nation to take part in such activities. In early 2009, the 2001 Convention will come into force and there should be no reason why the current position could not be reviewed in light of the growing number of acceptance amongst States.

### **6.3.2 Recommendations to enhance the present domestic legislative measures**

Any piece of legislation designed to protect the underwater cultural heritage must meet the principal objectives of the 2001 Convention, ie., that the law shall promote in situ as first option preservation whenever possible, prohibit commercially motivated treasure hunting activities, guarantee non-intrusive public access, impose the use of non-destructive technique in the event that recovery becomes a viable option in line with the objectives of the Convention and impose the rules and regulations such as those in the Annex Rules to the Convention as a minimum standard. As noted above, although the National Heritage Act 2005 was legislated to remedy legal loopholes under previous legislation relating to underwater cultural heritage, certain defects remain under the present legislation, particularly in connection with legal measures to realise those objectives mentioned above.

**(a) To expand the extent of scope of legislation**

At present, no law has been extended to apply beyond the territorial waters and this position is basically the same position under the Antiquities Act 1976 and its predecessor Act. This position needs to be rectified as some commercial salvors were under the impression that they were not legally required to secure the consent of coastal State prior to survey or recovery activities beyond the territorial waters. Such impression follows the position under the 1982 UNCLOS, which does not compel anyone intending to embark on surveying activities to obtain permission of the coastal State. In practice, the participation of the government of Malaysia had been secured. However, it was not made out of a sense of legal obligation but rather a strategy to secure cooperation from local authorities as well as in securing partners for commercial exploitation of such heritage.

**(b) To have clearer policy and guidelines on the following issues**

**(i) *Activities which are not directly targeted at underwater cultural heritage***

In terms of managing the discovery or recovery of historic wrecks lying in its maritime zones where Malaysia asserts jurisdiction (including those beyond its territorial waters), there should be clear guidelines in regulating any of these activities including those, which do not directly affect underwater cultural heritage. The new law creation of marine parks has sometimes created problems in terms of management of fisheries as livelihood of fishermen is often affected. Any further guidelines or sub-regulations must address this issue as the creation of protected zone for underwater cultural may also affect the fishing community, who relies on trawl net fishing.

**(ii) *Commercial exploitation of movable underwater cultural heritage objects***

In addition, there must also be clear guidelines or further sub-regulations regarding activities that may involve commercial exploitation of underwater cultural heritage. At present, the law does not bar any commercialisation of underwater cultural heritage.

What it does is to allow the Heritage Commissioner to deal with the underwater cultural heritage as he or she 'deems fit' for the purpose of the Act. The 'recovery' of historic wrecks, a major representation of underwater cultural heritage, however, is clearly still undertaken with the aid of commercial private companies, who has the relevant expertise. Further guidelines or sub-regulations should contain clear statements as to the nature of involvement of the private company and the government. In fact, the National Heritage Act 2005 itself needs to be re-examined the light of this issue. The *Titanic* guidelines which applies over projects involving the *Titanic*, serve good example how certain difficult issues relating to the commercial exploitation are resolved through the publication of a clear guidelines on the matter. Future problems involving the dispute over the distribution of artefacts such that occurred in the *Diana* wreck dispute between the government and the private salvage company could well be avoided with guidelines or sub-regulations that ensure national interest is well protected during the whole process of recovery and documentation of underwater cultural heritage.

*(iii) In Situ Preservation should be the First Option*

As noted above, the present legal position is weak in promoting in situ preservation of underwater cultural heritage. Apart from a short provision that the Commissioner for Heritage 'may' preserve underwater cultural heritage in situ, the language of the new law is still essentially a law designed at the recovery of cultural objects, their ownership and disposal, with little said on situ preservation. This position is contrary to the 2001 Convention's objective on in situ preservation as the *first* or the preferred option. The new law thus needs to be amended in order to be streamlined with the objective of the 2001 Convention, should the government proceeds to ratify the Convention. If all the new law does is to define the meaning of underwater cultural heritage, then that is precisely what it has achieved so far and no more.

*(iv) Annex Rules of the 2001 Convention*

Whether or not the government decides to proceed with the ratification of the 2001 UNESCO Convention, the Annex Rules, which serve as the minimum standard benchmarking in the good management of the underwater cultural heritage, should be incorporated in subsequent regulations in implementing provisions in Chapter IX of the National Heritage Act 2005 dealing with the underwater cultural heritage. The 2001 Convention may contain unsatisfactory jurisdictional provisions, which may be politically exploited by some States as an excuse not to sign up to the Convention. However, the Annex Rules relate directly to activities which affect underwater cultural heritage and States are free to take heed of the measures provided under the Annex Rules without ratifying the Convention.

*(v) Malaysia should consider bilateral or regional multilateral measures*

States too are free to enter into bilateral agreements with other States in protecting the heritage without being parties to the Conventions. This has already been done by certain States even prior to the adoption of the Convention. However, too much emphasis should not be made on how States can work to protect the underwater cultural heritage beyond the parameters of the 2001 Convention. Since the 2001 Convention is specially drafted to deal with the protection of underwater cultural heritage in maritime zones where national jurisdiction is lacking. World War II wrecks in Malaysian territorial and exclusive economic zones for instance, particularly the British and Japanese vessels, are currently not within the reach of domestic laws and there are no specific measures introduced to regulate foreign recreational diving activities directed at these war wrecks. Any domestic laws of the national country which scope of protection extends to anywhere their wrecks are located but beyond their territorial control, would only affect their nationals but not others. Hence, more successful endeavours could be expected to result from multi or bilateral cooperation.

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## APPENDIX (1)



### LAWS OF MALAYSIA

#### ACT 645 NATIONAL HERITAGE ACT 2005

|                                      |                                 |
|--------------------------------------|---------------------------------|
| Date of Royal Assent :               | 30 December 2005                |
| Date of publication in the Gazette : | 31 December 2005                |
| Date of coming into operation :      | 1 March 2006 [P.U. (B) 53/2006] |

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## **PART IX**

### **Section 61. Discovery of underwater cultural heritage**

- (1) Any person who discovers an underwater cultural heritage in the Malaysian waters shall, as soon as practicable, give notice of such discovery to the Commissioner or the port officer.
- (2) The port officer upon receiving such notice shall as soon as practicable notify, and where possible deliver the underwater cultural heritage to, the Commissioner.
- (3) The Commissioner may, upon being satisfied that the underwater cultural heritage has cultural heritage significance, cause it to be listed in the Register.
- (4) Any person who fails to give notice under subsection (1) commits an offence.

### **Section 62. Possession, custody or control of moveable underwater cultural heritage**

- (1) Where it appears to the Commissioner that a person is in or may have had possession, custody or control of any moveable underwater cultural heritage or part of an underwater cultural heritage the Commissioner may, by notice in writing to the person, require the person within the specified time in the notice furnish him with the full information of such moveable underwater cultural heritage.
- (2) Where the person has ceased to have such possession, custody or control of the moveable underwater cultural heritage, the person shall give the Commissioner particulars of the circumstances in which he ceased to have the possession, custody or control of such moveable underwater cultural heritage.
- (3) Where the person has transferred such possession, custody or control of the moveable underwater cultural heritage to another person, he shall give to the Commissioner the name and address of the person to whom such possession, custody or control of such moveable underwater cultural heritage was transferred.
- (4) Any person who fails to comply with any of the requirements under this section commits an offence.

### **Section 63. Declaration of underwater cultural heritage**

- (1) Where the Commissioner is of the opinion that any underwater cultural heritage is situated in Malaysian waters is of cultural heritage significance but less than one hundred years old, he shall advise the Minister and the Minister may by notice published in the *Gazette* declare the site or object to be a underwater cultural heritage.
- (2) Any site or object declared to be an underwater cultural heritage shall be listed in the Register.

### **Section 64. Protected zone**

- (1) The Minister may on the advise of the Commissioner, declare in the notice published in the *Gazette* any area within which an underwater cultural heritage is situated to be a protected zone.

(2) No person shall carry out any activity in the protected zone except with approval in writing from the Commissioner.

(3) Any person who contravenes subsection (2) commits an offence.

### **Section 65. Salvage and excavation works to be licensed**

(1) No person shall carry on any salvage or excavation work in any Malaysian waters for the purpose of finding any underwater cultural heritage, except with a licence approved by the Commissioner.

(2) Any person who contravenes subsection (1) commits an offence

### **Section 66. Ownership of underwater cultural heritage found during survey, salvage and excavation**

(1) Any underwater cultural heritage discovered during any survey, salvage or excavation works shall vest in the Commissioner and shall be listed in the Register.

(2) Where the Commissioner takes possession of any underwater cultural heritage, he shall within forty-eight hours cause to be posted a list of the underwater cultural heritage in any port office within the district where the underwater cultural heritage was discovered.

(3) Any owner of the underwater cultural heritage may, upon establishing his claim to the satisfaction of the Commissioner, within one year from the time at which the underwater cultural heritage came into the possession of the Commissioner, and upon paying the salvage fees and expenses due, be entitled to have the possession of the underwater cultural heritage upon such terms and conditions as may be imposed by the Commissioner.

(4) An owner who fails to comply with any of the terms and conditions imposed under subsection (3) commits an offence.

(5) Where no owner establishes a claim within one year, the underwater cultural heritage shall be the absolute property of the Federal Government.

(6) Unless otherwise directed by the Minister, the Commissioner may preserve the underwater cultural heritage *in situ*.

### **Section 67. Declaration of National Heritage**

(1) The Minister may, by order published in the *Gazette*, declare any heritage site, heritage object, underwater cultural heritage listed in the Register or any living person as a National Heritage.

(2) In making a declaration under subsection (1) the Minister may consider—

- (a) the historical importance, association with or relationship to Malaysian history;
- (b) the good design or aesthetic characteristics;
- (c) the scientific or technical innovations or achievements;

(d) the social or cultural associations;

(e) the potential to educate, illustrate or provide further scientific investigation in relation to Malaysian cultural heritage;

(f) the importance in exhibiting a richness, diversity or unusual integration of features;

(g) the rarity or uniqueness of the natural heritage, tangible or intangible cultural heritage or underwater cultural heritage;

(h) the representative nature of a site or object as part of a class or type of a site or object; and

(i) any other matter which is relevant to the determination of cultural heritage significance.

(3) Where the site, object or underwater cultural heritage is situated on State land, the Minister shall consult the State Authority before making any declaration under subsection (1).

(4) Where the site, object or underwater cultural heritage is on an alienated land or belongs to any person other than the Federal Government or a State Government, the owner, custodian or trustee of that site, immovable object or underwater cultural heritage shall be notified at least thirty days prior to the date of the proposed declaration.

(5) Where the declaration under subsection (1) involves an intangible cultural heritage and copyright still subsists in such works, the consent of the copyright owner shall be obtained before any declaration is made.

(6) Where the declaration under subsection (1) involves a living person, the consent of that person shall be obtained before any declaration is made.

(7) A copy of the order shall be served on the owner, custodian or trustee of the site, object or underwater cultural property or on the living person.

(8) Any person who objects to the making of the declaration under subsection (1) may submit an objection in writing to the Minister within three months of its publication and may apply to the Minister for the revocation of the order.

(9) The Minister may, after having been advised by the Council, revoke or refuse to revoke the order and such decision shall be final.

## APPENDIX (2)

### MERCHANT SHIPPING ORDINANCE 1952\*

*(Federation of Malaya Ordinance No.70 of 1952)*

#### **PART X WRECK AND SALVAGE *Vessels in Distress***

##### **366. Interpretation**

In this Part, unless the context otherwise requires -

"receiver" means receiver of wreck;

"salvage" includes all expenses properly incurred by the salvor in the performance of salvage services;

"vehicle" includes any vehicle of any description, whether propelled by mechanical power or otherwise and whether used for drawing other vehicles or otherwise;

"wreck" includes jetsam, flotsam, lagan and derelict found in or on the shores of the sea or any tidal water.

##### **367. Appointment of a Principal Receiver of Wreck and receivers of wreck**

(1) The Director of Marine shall be the Principal Receiver of Wreck and shall have all the powers of a receiver throughout the Federation.

(2) The Principal Receiver of Wreck shall exercise general direction and supervision over all matters relating to wreck and salvage.

(3) The Minister (LN 332/58) may appoint any person to be a receiver of wreck in any district and to perform the duties of receiver under this Part and shall give notice of the appointment in the Gazette. (No. 49 of 1955)

##### **368. Duty of receiver where vessel in distress**

(1) Where a British, Malayan or foreign vessel is wrecked, stranded or in distress at any place on or near coasts of the Federation or any tidal water within the limits of the Federation, the receiver of wreck for the district in which that place is situated shall upon being made acquainted with the circumstances, forthwith proceed there, and upon his arrival shall take the command of all persons present and shall assign such duties and give such directions to each person as he

thinks fit for the preservation of the vessel and of the lives of the persons belonging to the vessel, in this Part referred to as shipwrecked persons, and of the cargo and apparel of the vessel.

(2) Any person, who wilfully disobeys the direction of the receiver, shall be liable for each offence to a fine not exceeding five hundred dollars, but the receiver shall not interfere between the master and the crew of the vessel in reference to the management thereof unless he is requested to do so by the master.

### **369. Powers of receiver in case of vessels in distress**

(1) The receiver may, with a view to such preservation as aforesaid of shipwrecked persons or of the vessel, cargo or apparel -

- (a) require such persons as he thinks necessary to assist him;
- (b) require the master or other person having the charge of any vessel near at hand to give such aid with his men or vessel as is in his power;
- (c) demand the use of any vehicle or any draught animal that may be near at hand.

(2) Any person who refuses without reasonable cause to comply with any such requisition or demand shall be liable for each refusal to a fine not exceeding one thousand dollars.

### **370. Power to pass over adjoining lands**

(1) Whenever a vessel is wrecked, stranded or in distress as aforesaid, all persons may for the purpose of rendering assistance to the vessel, or of saving the lives of the shipwrecked persons, or of saving the cargo or apparel of the vessel, unless there is some public road equally convenient, pass and repass, either with or without vehicles or draught animals, over any adjoining lands without being subject to interruption by the owner or occupier, so that they do as little damage as possible, and may also on the like condition, deposit on those lands any cargo or other article recovered from the vessel.

(2) Any damage sustained by an owner or occupier in consequence of the exercise of the rights given by this section shall be a charge on the vessel, cargo or articles, in respect of or by which the damage is occasioned, and the amount payable in respect of the damage shall, in case of dispute, be determined and shall, in default of payment, be recoverable in the same manner as the amount of salvage is under this Part determined or recoverable.

(3) Any owner or occupier of any land who -

- (a) impedes or hinders any person in the exercise of the rights given by this section by locking his gates, or refusing upon request to open the same, or otherwise; or
- (b) impedes or hinders the deposit of any cargo or other articles recovered from the vessel as aforesaid on the land; or
- (c) prevents or endeavours to prevent any such cargo or other article from remaining deposited on the land for a reasonable time until it can be removed to a safe place of public deposit;

shall be liable for each offence to a fine not exceeding one thousand dollars.

### **371. Power of receiver to suppress plunder and disorder by force**



(1) Whenever a vessel is wrecked, stranded or in distress as aforesaid, and any person plunders, creates disorder or obstructs the preservation of the vessel or of the shipwrecked persons or of the cargo or apparel of the vessel, the receiver may cause that person to be apprehended.

(2) The receiver may use force for the suppression of any such plundering, disorder or obstruction, and may command any person to assist him in so using force.

(3) If any person is killed, maimed or hurt, by reason of his resisting the receiver or any person acting under the orders of the receiver in the execution of the duties by this Part committed to the receiver, neither the receiver nor the person acting under his order shall be liable to any punishment or to pay any damages by reason of the person being so killed, maimed or hurt.

### **372. Exercise of powers of receiver in his absence**

(1) Where a receiver is not present, the following officers or persons in succession, each in the absence of the other, in the order in which they are named, namely, Superintendent or Assistant Superintendent of Police, Magistrate or Justice of the Peace, may do anything by this Part authorized to be done by the receiver.

(2) An officer acting under this section for a receiver shall, with respect to any goods or articles belonging to a vessel the delivery of which to the receiver is required by this Ordinance, be considered as the agent of the receiver, and shall place the same in the custody of the receiver, but he shall not be entitled to any fees payable to receiver or be deprived by reason of his so acting of any right to salvage to which he would otherwise be entitled.

### **373. Examination in respect of ships in distress**

(1) Where any ship, British, Malayan or foreign, is or has been in distress on the coasts of the Federation, a receiver of wreck, or in his absence a Magistrate or a Justice of the Peace, shall as soon as conveniently may be examine on oath any person belonging to the ship, or any other person who is able to give any account thereof or of the cargo or stores thereof, as to the following matters:-

- (a) the name and description of the ship;
- (b) the name of the master and of the owners;
- (c) the names of the owners of the cargo;
- (d) the ports from and to which the ship was bound;
- (e) the occasion of the distress of the ship;
- (f) the services rendered;
- (g) such other matters or circumstances relating to the ship or to the cargo on board the same as the person holding the examination thinks necessary.

(2) The person holding the examination shall take the same down in writing, and shall send one copy thereof to the *Minister (LN 332/58)*, and another to any Port Officer within the district, where it shall be placed in some conspicuous situation for the inspection of persons desirous of examining the same.

(3) The person holding the examination shall for the purpose thereof have all the powers of an Inspector under this Ordinance.

## ***Dealing with Wreck***

### **374. Rules to be observed by persons finding wreck**

(1) Where any person finds or takes possession of any wreck within the limits of the Federation or of any wreck found or taken possession of outside the limits of the Federation and brought within the limits of the Federation, he shall -

(a) if he is the owner thereof, give notice to the receiver of the district stating that he has found or taken possession of the same, and describing the marks by which the same may be recognised;

(b) if he is not the owner thereof, as soon as possible deliver the same to the receiver of the district.

(2) Any person who fails, without reasonable cause, to comply with this section, shall be liable for such offence to a fine not exceeding one thousand dollars, and shall in addition, if he is not the owner, forfeit any claim in salvage, and shall be liable to pay to the owner of the wreck if it is claimed, or if it is unclaimed to the person entitled to the same, double the value thereof, to be recovered in the same way as a fine of a like amount under this Ordinance.

### **375. Penalty for taking wreck at the time of casualty**

(1) Where a vessel is wrecked, stranded or in distress at any place on or near the coasts of the Federation, or any tidal water within the limits of the Federation, any cargo or other articles belonging to or separated from the vessel which are washed on shore or otherwise lost or taken from the vessel shall be delivered to the receiver.

(2) Any persons, whether the owner or not, who secretes or keeps possession of any such cargo or article, or refuses to deliver the same to the receiver or any person authorised by him to demand the same, shall be liable for each offence to a fine not exceeding one thousand dollars.

(3) The receiver or any person authorised as aforesaid may take any such cargo or articles by force from the person so refusing to deliver the same.

### **376. Notice of wreck to be given by receiver**

Where a receiver takes possession of any wreck, he shall within forty-eight hours cause to be posted in any Port Office within the district where the wreck was found or was seized by him, and, if he thinks it desirable, he shall send to the Secretary of Lloyd's in London, a description thereof and of any marks by which it is distinguished.

### **377. Claim of owners to wreck**

(1) The owner of any wreck in the possession of the receiver, upon establishing his claim to the same to the satisfaction of the receiver within one year from the time at which the wreck came into possession of the receiver, shall, upon paying the salvage fees and expenses due, be entitled to have the wreck or the proceeds thereof delivered up to him.

(2) Where any wreck or any articles belonging to or forming part of a foreign ship which has been wrecked on or near the coasts of the Federation, or belonging to and forming part of the cargo, are found on or near those coasts or are brought into any port in the Federation, the consular officer of the country to which the ship, or, in the case of cargo, to which the owners of the cargo may have belonged shall, in the absence of the owner and of the master or other agent of the owner, be deemed to be the agent of the owner, so far as relates to the custody and disposal of the wreck or such articles.

### **378. Immediate sale of wreck by receiver in certain cases**

(1) A receiver may at any time sell any wreck in his custody, if in his opinion -

- (a) it is under the value of one hundred dollars;
- (b) it is so much damaged or of so perishable a nature that it cannot with advantage be kept; or
- (c) it is not of sufficient value to pay for ware-housing.

(2) The proceeds of the sale shall, after defraying the expenses thereof, be held by the receiver for the same purposes and subject to the same claim, rights and liabilities as if the wreck had remained unsold.

### ***Unclaimed Wreck***

### **379. Unclaimed wreck**

(1) Where no owner establishes a claim to any wreck found in the Federation, or to any wreck found or taken possession of outside the Federation and brought within the Federation and in the possession of a receiver, within one year after it came into his possession, the receiver shall sell the same, and shall pay the proceeds of the sale into the Treasury, after deducting therefrom the expenses of the sale and any other expenses incurred by him and his fees and paying there out to the salvors such amount of salvage as the Minister in each case or by any general rule determines.

### **380. Delivery of unclaimed wreck by receiver not to prejudice title**

Upon delivery of wreck or payment of the proceeds of sale of wreck by a receiver, in pursuance of this Part, the receiver shall be discharged from all liability in respect thereof, but the delivery thereof shall not prejudice or affect any question which is raised by third parties concerning the right or title to the wreck.

### **381. Removal of wreck by receiver**

*(1) Where any ship is sunk, stranded or abandoned in any port, navigable river, tidal waters or in any place within Malaysia waters in such manner as, in the opinion of the receiver, to be or likely to become an obstruction or danger to navigation or a public nuisance or to cause inconvenience, the receiver may either -*

- (a) take possession of, and raise, remove or destroy, the whole or any part of the ship;*
- (b) light or buoy any such ship or part until the raising, removal or destruction thereof;*
- (c) sell, in such manner as he thinks fit, any ship or part so raised or removed and also any other property recovered in the exercise of his powers under this section, and, out of*

*the proceeds of the sale, reimburse himself for the expenses incurred by him in relation thereto under this section, and the receiver shall hold the surplus, if any, of the proceeds in trust for the persons entitled thereto; and*

*(d) take all necessary measures to prevent pollution from the ship;*

*or alternatively -*

*(e) consent to the owner or master of the ship taking such action under paragraphs (a) to (d) as the receiver thinks fit; and*

*(f) require the owner or master to furnish security in such reasonable amount as the receiver may consider necessary for the purpose of ensuring the performance of all actions which the owner or master has agreed to undertake.*

*(2) Apart from the proceeds of any sale carried out by the receiver pursuant to paragraph (c) of subsection (1), the receiver may also resort to the security furnished under paragraph (f) to reimburse himself and if the proceeds of sale together with any security are insufficient to cover the costs incurred by the receiver when acting under paragraphs (a) to (d) of subsection (1), he may recover the difference from the owner or master of the ship concerned. (A792/91)*

### **382. Powers of removal extend to tackle, cargo etc.**

The provision of this Part relating to removal of wrecks shall apply to every article or thing or collection of things being or forming part of the tackle, equipments, cargo, stores or ballast in the term "vessel" and for the purposes of these provisions any proceeds of sale arising from a vessel and from the cargo thereof, or any other property recovered therefrom, shall be regarded as a common fund.

### **383. Powers to be cumulative**

The powers conferred by this Part on a receiver for the removal of wrecks shall be in addition to and not in derogation of any other powers conferred upon a Port Officer under Part XIII.

### **384. Taking wreck to foreign port**

Any person who takes into any foreign port any vessel, stranded, derelict or otherwise in distress found on or near the coasts of the Federation, or any tidal water within the limits of the Federation, or any part of the cargo or apparel thereof or anything belonging thereto, or any wreck found within those limits, and there sells the same, shall be liable to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding five years.

### **385. Interfering with wrecked vessel or wreck**

(1) No person shall, without the leave of the master, board or endeavour to board any vessel which is wrecked, stranded or in distress, unless that person is, or acts by command of, the receiver or a person lawfully acting as such.

(2) Any person who acts in contravention of sub-section (1) shall be liable for each offence to a fine not exceeding five hundred dollars and the master of the vessel may repel him by force.

(3) No person shall -

- (a) impede or hinder, or endeavour in any way to impede or hinder, the saving of any vessel stranded or in danger of being stranded, or otherwise in distress, on or near any coast or tidal water, or of any part of the cargo or apparel thereof or of any wreck;
  - (b) secrete any wreck, or deface or obliterate any marks thereon; or
  - (c) wrongfully carry away or remove any part of a vessel stranded or in danger of being stranded, or otherwise in distress on or near any coast or tidal water, or any part of the cargo or apparel thereof or any wreck.
- (4) Any person who acts in contravention of sub-section (3) shall be liable for each offence to a fine not exceeding five hundred dollars, and such fine may be inflicted in addition to any punishment to which he may be liable by law under this Ordinance or otherwise.

### **386. Summary procedure for concealment of wreck**

- (1) Where a receiver suspects or receives information that any wreck is secreted or in the possession of some person who is not the owner thereof, or that any wreck is otherwise improperly dealt with, he may apply to any Magistrate's Court for a search warrant.
- (2) Such Court may grant such a warrant, and the receiver, by virtue thereof, may enter any house or other place wherever situate and also any vessel and search for, seize and detain any such wreck there found.
- (3) If any such seizure of wreck is made in consequence of information given by any person to the receiver, the informer shall be entitled, by way of salvage, to such sum not exceeding in any case fifty dollars as the receiver allows.

### ***Collision***

### **387. General duty to render assistance to persons in danger at sea**

- (1) The master or person in charge of a vessel shall, so far as he can do so without serious danger to his own vessel, her crew and passengers (if any), render assistance to every person, even if such person be a subject of a foreign State at war with the *Yang Di Pertuan Agong*, (LN 332/58) who is found at sea in danger of being lost, and, if he fails to do so, he shall be guilty of an offence and shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding two thousand dollars or to both.
- (2) Compliance by the master or person in charge of a vessel with the provisions of this section shall not affect his right or the right of any other person to salvage.

### **388. Duty of vessel to assist the other in case of collision**

- (1) In every case of collision between two vessels it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without danger to his own vessel, crew, and passengers (if any) -
- (a) to render to the other vessel, her master, crew, and passengers (if any) such assistance as may be practicable and may be necessary to save them from any danger caused by the collision and to stay by the other vessel until he has ascertained that she has no need of further assistance; and also

- (b) to give to the master or person in charge of the other vessel the name of his own vessel and of the port to which she belongs and also the names of the ports from which she comes and to which she is bound.
- (2) If the master or person in charge fails without reasonable cause to comply with this section, he shall be guilty of an offence and shall be liable to imprisonment for a term not exceeding two years or to a fine not exceeding two thousand dollars or to both.

## **Salvage**

### **389. Salvage payable for saving life**

(1) Where services are rendered wholly or in part within British waters or within the territorial waters of the Federation in saving life from any British, Malayan or foreign vessel, or elsewhere in saving life from any British or Malayan vessel, or from any foreign vessel belonging to a country as to which an Order in Council has been made under section 545 of the Merchant Shipping Act, 1894, there shall, subject to the case of a foreign ship to any condition or qualifications contained in the Order, be payable to the salvor by the owner of the vessel, cargo or apparel saved, a reasonable amount of salvage, to be determined in case of dispute in manner hereinafter mentioned.

(2) Salvage in respect of the preservation of life when payable by the owners of the vessel shall be payable in priority to all other claims for salvage.

(3) Where the vessel, cargo and apparel are destroyed, or the value thereof is insufficient, after payment of the actual expenses incurred, to pay the amount of salvage payable in respect of the preservation of life, the Minister may, in his discretion, award to the salvor out of the general revenue of the Federation such sum as he thinks fit in whole or part satisfaction of any amount of salvage so left unpaid.

### **390. Salvage of cargo or wreck**

Where any vessel is wrecked, stranded, or in distress at any place on or near the coasts of the Federation, or in any tidal water within the limits of the Federation, and services are rendered by any person in assisting that vessel or saving the cargo or apparel of that vessel or any part thereof, and where services are rendered by any person other than a receiver in saving any wreck, there shall be payable to the salvor by the owner of the vessel, cargo, apparel or wreck, a reasonable amount of salvage to be determined in case of dispute in manner hereinafter mentioned.

### **391. Services to which sections 354 and 355 do not apply**

Nothing in section 389 or section 390 shall entitle any person to remuneration -

- (a) In respect of services rendered contrary to an express and reasonable prohibition of such services on the part of the vessel to which the same were rendered;
- (b) in respect of services rendered by a tug to or in respect of the vessel which she is towing or the cargo thereof, except where such services are of an exceptional character such as are outside the scope of the contract of towage.

### **392. Where both vessels belong to the same owner**



Sections 389 and 390 shall have effect notwithstanding that the vessel rendering the services and the vessel to which the services are rendered may be owned by the same person.

### ***Procedure in Salvage***

#### **393. Determination of salvage disputes**

(1) Disputes as to the amounts of salvage, whether of life or property and whether rendered within or without the Federation, arising between the salvor and the owners of any vessel, cargo, apparel or wreck shall, if not settled by agreement, arbitration or otherwise, be determined summarily by a Sessions Court in any case where -

- (a) the parties to the dispute consent; or
- (b) the value of the property saved does not exceed five thousand dollars; or
- (c) the amount claimed does not exceed one thousand dollars.

(2) Subject as aforesaid, disputes as to salvage shall be determined by the High Court, but if the claimant does not recover in the High Court more than one thousand dollars, he shall not be entitled to recover any costs, charges or expenses incurred by him in the prosecution of his claim unless such Court certifies that the case is a fit one to be tried by the High Court.

(3) Disputes relating to salvage may be determined on the application either of the salvor or of the owner of the property saved or of their respective agents.

#### **394. Determination of disputes as to salvage summarily**

(1) Disputes as to salvage which are to be determined summarily in manner provided by this Ordinance shall -

- (a) where the dispute relates to the salvage of wreck, be referred to a Sessions Court having jurisdiction at or near the place where the wreck is found; or
- (b) where the dispute relates to salvage in the case of services rendered to any vessel or to the cargo or apparel thereof or in saving life therefrom be referred to a Sessions Court having jurisdiction at or near the port in the Federation into which the vessel is first brought after the occurrence by reason whereof the claim of salvage arises.

(2) A Sessions Court may, for the purpose of determining any such dispute, call in to its assistance any person conversant with maritime affairs as assessor, and there shall be paid as part of the costs of the proceedings to every such assessor in respect of his services such sum not exceeding fifty dollars as the Minister directs.

#### **395. Apportionment of salvage amongst owners, etc. foreign ship**

Where any dispute arises as to the appointment of any amount of salvage among the owners, master, pilot, crew, and other persons in the service of any foreign vessel, the amount shall be apportioned by the Court or person making the apportionment in accordance with the law of the country to which the vessel belongs.

#### **396. Matters to be considered in determining amount or distribution of salvage**



(1) In determining the amount payable under section 389 or section 390 or the proportion in which the remuneration is to be distributed among the salvors, the Court shall take into consideration -

- (a) the measure of success obtained;
- (b) the effects and deserts of the salvors;
- (c) the danger run by the salvaged vessel, by her passengers, crew, and cargo;
- (d) the danger run by the salvaging vessel and the salvors;
- (e) the time expended, the expenses incurred, the losses suffered, and the risks of liability and other risks run by the salvors and the value of the property exposed to such risks, due regard being had to the special appropriation (if any) of the salvors' vessel for salvage purposes;
- (f) the value of the property salvaged.

(2) If it appear to the Court that the salvors have by their fault rendered the salvage or assistance necessary or have been guilty of theft or of any fraud, the Court may disallow or otherwise deal with any claim to remuneration as it may deem fit.

### **397. Appeal in case of salvage disputes**

Where a dispute relating to salvage has been determined by a Sessions Court, any party aggrieved by the decision may appeal therefrom in accordance with the Rules of the Supreme Court to the Court of Appeal, but no such appeal shall be allowed unless the sum in dispute exceeds five hundred dollars.

### **398. Valuation of property by receiver**

(1) Where any dispute as to salvage arises, the receiver of the district where the property is in respect of which the salvage claim is made may, on the application of either party, appoint a valuer to value that property, and shall give copies of the valuation to both parties.

(2) Any copy of the valuation purporting to be signed by the valuer, and to be certified as a true copy by the receiver, shall be admissible as evidence in any subsequent proceeding.

(3) Such fee as the Minister directs shall be paid in respect of the valuation by the person applying for the same.

### **399. Detention of property liable to salvage by a receiver**

(1) Where salvage is due to any person under this Ordinance, the receiver shall -

- (a) if the salvage is due in respect of services rendered in assisting any vessel, or in saving life therefrom, or in saving the cargo or apparel thereof, detain the vessel and cargo or apparel; and
- (b) if the salvage is due in respect of the saving of any wreck, and the wreck is not sold as unclaimed under the Ordinance, detain the wreck.

(2) Subject as hereinafter mentioned, the receiver shall detain the vessel and the cargo and apparel, or the wreck (hereinafter referred to as "detained property"), until payment is made for salvage or process is issued for the arrest or detention thereof by the High Court.

(3) A receiver may release any detained property if security is given to his satisfaction or, if the claim for salvage exceeds one thousand dollars and any question is raised as to the sufficiency of the security, to the satisfaction of a Judge of the High Court.

(4) Any security given for salvage in pursuance of this section to an amount exceeding one thousand dollars may be enforced by the High Court in the same manner as if bail had been given by that Court.

#### **400. Sale of detained property**

(1) The receiver may sell any detained property, if the person to pay the salvage in respect of which the property is detained are aware of the detention, in the following cases -

(a) where the amount is not disputed and payment of the amount due is not made within twenty days after the amount is due;

(b) where the amount is disputed but no appeal lies, and payment is not made within twenty days after the decision of such Court; or

(c) where the amount is disputed and an appeal lies from the decision of the Court to the Court of Appeal, and within twenty days of the decision neither payment of the sum due is made nor have any proceedings been taken for the purpose of appeal.

(2) The proceeds of sale of detained property shall, after payment of the expenses of the sale, be applied by the receiver in payment of the expenses, fees and salvage, and, so far as not required for that purpose, shall be paid to the owners of the property or any other person entitled to receive the same.

#### **401. Apportionment of salvage by receiver**

(1) Where the aggregate amount of salvage payable in respect of salvage services rendered in the Federation has been finally determined, either summarily in manner provided by this Ordinance or by agreement, and does not exceed one thousand dollars, but a dispute arises as to the apportionment thereof among several claimants, the person liable to pay the amount may apply to the receiver for liberty to pay the same to him.

(2) The receiver shall, if he thinks fit, receive the same accordingly, and shall grant to the person paying the amount a certificate of the amount paid and of the services in respect of which it is paid, and that certificate shall be a full discharge and indemnity to the person by whom the money is held and to his vessel, cargo, apparel and effects against the claims of all persons whomsoever in respect of the services mentioned in the certificate.

(3) The receiver shall with all convenient speed distribute any amount received by him under this section among the persons entitled to the same on such evidence and in such shares and proportions as he thinks fit, and may retain any money which appears to him to be payable to any person who is absent.

(4) A distribution made by the receiver in pursuance of this section shall be final and conclusive as against all persons claiming to be entitled to any portion of the amount distributed.

#### **402. Apportionment of salvage by High Court**

Whenever the aggregate amount of salvage payable in respect of salvage service rendered in the Federation has been finally ascertained and exceeds one thousand dollars, and whenever the aggregate amount rendered elsewhere has been finally ascertained, whatever that amount may be, then, if any delay or dispute arises as to the apportionment thereof, the High Court-

- (a) may cause the same to be apportioned amongst the persons entitled thereto in such manner as it thinks just, and may for that purpose, if it thinks fit, appoint any person to carry that apportionment into effect;
- (b) may compel any person in whose hands or under whose control the amount may be to distribute the same or to bring the same into Court to be there dealt with as the Court directs; and
- (c) may for the purposes aforesaid issue such processes as it thinks fit.

### ***Jurisdiction of High Court in Salvage***

#### **403. Jurisdiction of High Court in salvage**

Subject to this Ordinance and any Imperial Act in force in the Federation or any part thereof, the High Court shall have jurisdiction to decide upon all claims whatsoever relating to salvage, whether the services in respect of which salvage is claimed were performed on the high seas or within the Federation, or partly on the high seas and partly within the Federation, and whether the wreck in respect of which salvage is claimed is found on the sea or on the land or partly on the sea and partly on the land.

### ***Fees of Receivers of Wreck***

#### **404. Receiver's fees**

(1) There shall be paid to every receiver the expenses properly incurred by him in the performance of his duties, and also, in respect of the several matters specified in the Ninth Schedule, such fees as are therein mentioned, but a receiver shall not be entitled to any remuneration other than those payments.

(2) The receiver shall, in addition to all other rights and remedies for the recovery of those expenses or fees, have the same rights and remedies in respect thereof as a salvor has in respect of salvage due to him.

(3) Whenever any dispute arises as to the amount payable to any receiver in respect of expenses or fees, that dispute shall be determined by the Minister, whose decision shall be final.

(4) All fees received by a receiver in respect of any services performed by him as receiver shall be accounted for to Government, and shall be applied in defraying any expenses duly incurred in carrying this Ordinance into effect, and, subject to such application, shall form part of the public revenue of the Federation.

## APPENDIX (3)



### LAWS OF MALAYSIA

#### ACT 168 ANTIQUITIES ACT 1976

|                                      |                  |
|--------------------------------------|------------------|
| Date of Royal Assent :               | 6th March, 1976  |
| Date of publication in the Gazette : | 11th March, 1976 |
| Date of coming into operation :      | 26th March 1976. |

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Long Title & Preamble

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## Long Title & Preamble

An Act to provide for the control and preservation of, and research into ancient and historical monuments, archaeological sites and remains, antiquities and historical objects and to regulate dealings in and export of antiquities and historical objects and for matters connected therewith.

BE IT ENACTED by the Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong with the advice and consent of the Dewan Negara and Dewan Rakyat in Parliament assembled, and by the authority of the same, as follows :

### PART I - PRELIMINARY

#### Section 1. Short title and application.

This act may be cited as the **Antiquities Act ,1976** and shall apply only to West Malaysia.

#### Section 2. Interpretation.

(1) In this Act, unless the context otherwise requires-

"ancient monument" means any monument in West Malaysia which is or is reasonably believed to be at least one hundred years old or which is declared in accordance with section 15 to be an ancient monument;

"antiquity" means-

(a) any object moveable or immovable or any part of the soil of the bed of a river or lake or of the sea, which has been constructed, shaped, inscribed, erected, excavated or otherwise produced or modified by human agency and which is or is reasonably believed to be at least one hundred years old;

(b) any part of any such object which has at any later date been added thereto or re-constructed or restored;

(c) any human, plant or animal remains which is or is reasonably believed to be at least one hundred years old; and

(d) any object of any age which the Director-General by notification in the *Gazette* declares to be an antiquity;

"customs airport" and custom port have the same meanings assigned to them by the Customs Act, 1967 [62/67];

"Director-General" means the Director-General of Museums, Malaysia;

"District Officer," in relation to any area comprised within any municipality, includes the Secretary to such municipality and the word "District" shall be deemed to include when appropriate a



reference to such area;

"export" with its grammatical variations and cognate expressions means to take or cause to be taken out of West Malaysia, by land, sea or air or to place any goods in a vessel, conveyance or aircraft for the purpose of such goods being taken out of West Malaysia by land, sea or air;

"Government" means the Federal Government;

"historical object" means any artefact or other object to which religious traditional artistic or historic interest is attached and includes any-

(a) ethnographic material such as a household or agricultural implement, decorative article, personal ornament;

(b) work of art such as a carving, sculpture, painting, architecture, textile musical instrument, weapon and other handicraft;

(c) manuscript, coin currency note medal, badge, insignia, coat of arm, crest flag, arm and armour;

(d) vehicle ship and boat, in part or in whole whose production have ceased;

"historical site" means a site which has been declared in accordance with provisions of section 15 to be a historical site;

"Minister" means the Minister charged with responsibility for museums;

"monument" means any temple, church, building, monument, port, earthwork, standing stone, keramat, cave or other structure erection or excavation, and any tomb, tumulus or other place of interment or any other immovable property of a like nature or any part or remains of the same, the preservation of which is a matter of public interest, by reason of the religious, traditional or archaeological interest attaching thereto, and includes the site of any monument and such portion of land adjoining such site as may be required for fencing or covering in or otherwise preserving ant monument and the means of access there to;

"occupier" includes the cultivator or person in actual possession, management or control of any land, and includes any person having the possession or control of any movable property;

"owner", in relation to any land, means the registered owner or the holder by customary tenure;

"proper officer of customs" has the same meaning assigned to it by the Customs Act, 1967 [62/67].

(2) For the purpose of deciding whether any object is or is not an antiquity or a historical object, the Director-General may examine it and may call upon expert opinion.

(3) A certificate by the Director General that any object is an antiquity or a historical object, or that he is satisfied that an antiquity or a historical object is or will be of lasting national importance or interest shall be final.

## **PART II - DISCOVERY OF, AND PROPERTY IN, ANTIQUITIES**

### **Section 3. Property in antiquities.**

- (1) Subject to the provisions of this Act, every antiquity discovered in West Malaysia on or after the date of the coming into force of this Act shall be the absolute property of the Government.
- (2) Every ancient monument which on the date of the coming into force of this Act is not owned by any person or the control of which is not vested in any person as a trustee or manager, shall be deemed to be the absolute property of the Government.
- (3) All undiscovered antiquities (other than ancient monuments), whether lying on or hidden beneath the surface of the ground or in any river or lake or in the sea, shall be deemed to be the absolute property of the Government.
- (4) In any legal proceedings relating to an antiquity it shall be presumed until the contrary is proved that it was discovered after the date of the coming into force of this Act

#### **Section 4. Notice of discovery of antiquities, or ancient monument.**

- (1) Any person who discovers any object or monument which he has reason to believe to be an antiquity or ancient monument shall forthwith give notice of his discovery to the Penghulu or Penggawa of the area or the District Officer of the District wherein the antiquity was discovered, and if it is practicable so to do, shall deliver the antiquity to the District Officer, who shall give a receipt therefor.
- (2) A Penghulu or Pengawa receiving notice as in subsection (1) shall inform the District Officer of the District wherein the antiquity was discovered.
- (3) If the District Officer has reason to believe that any object discovered in his District is an antiquity he may by notice in writing require the person having possession thereof, if it practicable so to do, to deliver the same forthwith to him, and the District Officer on receiving such object shall give receipt therefor.
- (4) A District Officer receiving notice under subsection (1) shall communicate the same to the Director-General.
- (5) Where any object has been delivered to a District Officer under subsection (1) or (3) or where the District Officer has reason to believe that any object or monument he shall give notice thereof the Director-General.

#### **Section 5. Compensation for certain antiquities.**

- (1) On the discovery of any antiquity, the Director General shall be entitled to the custody and possession of the same on behalf of the Government and shall be responsible for its recording, preservative treatment and ultimate disposal.
- (2) In any case the Director-General may decide not to retain such antiquity and the same shall then be returned to the person who delivered up possession thereof in such antiquity shall be deemed to have been transferred to the person to whom such antiquity would have belonged if section 3 had never been enacted.
- (3) When any antiquity is retained by the Director General or where in the opinion of the Director-General the same should be preserved in the place where it was found, there shall be paid by the Director-General reasonable compensations to-

(a) the finder thereof, and

(b) the owners of the land in or on which the same was discovered, if such land is not a state land or Federal land:

Provided that no such payment as aforesaid shall be made to the finder thereof where the finder has failed to give notice the discovery of the same in accordance with section 4.

## **Section 6. Apportionment of antiquities.**

(1) Notwithstanding section 3 and 5 the Director-General on behalf of the Government may enter into an agreement in writing with any person who would under section 5 be entitled a compensation for such antiquity whereby such person shall receive from the Director General, in place of such compensation, a share of such antiquity to be appointed in such manner as may be provided in the said agreement.

(2) Every agreement under subsection (1) shall have force and effect notwithstanding anything in section 5.

Provided that where the finder of any antiquity does not report the discovery thereof in accordance with the provisions of section 4 he shall not be entitled to receive any share of such antiquity under any such agreement.

## **Section 7. Sale or disposal of antiquities and historical objects.**

(1) The Director General may by notice in writing require any person in possession of or lawfully entitled to sell or dispose of any antiquity or any historical object which the Director-General is satisfied to be or will be of lasting national importance or interest not to sell or otherwise dispose of such antiquity or historical object without giving notice in writing to him of any such proposed transaction.

(2) No person shall sell or otherwise dispose of any antiquity or historical object in respect of which a notice under subsection (1) has been given until after a lapse of ninety days after the giving by notice by such person of his intention to sell or otherwise dispose of the antiquity or historical object and in the meanwhile it shall be lawful for the Director-General to purchase such antiquity or historical object at a reasonable price notwithstanding any agreement which the may have entered into with another person.

## **Section 8. Dispute as to compensation or apportionment.**

Where there is any dispute between the Director-General and any person as to the reasonable compensation for any antiquity or historical object or to the apportionment of any antiquity in term of an agreement under section 6, such dispute shall be submitted to the Minister whose decision shall be final.

## **Section 9. No excavation except upon licence.**

Subject as hereinafter provided, no person shall excavate for the purpose of discovering antiquity whether on land of which he is the owner or occupier or otherwise, except under the authority of a licence granted by the Director-General.

## **Section 10. Application for licence to excavate**

Every application for a licence to excavate shall -

- (a) be made to the Director-General in the prescribed form; and
- (b) contain a full and accurate description of the land on which it is proposed to carry out the excavation, the purpose, nature and extent of the proposed excavation, and such other particulars as may be prescribed.

### **Section 11. Grant or refusal of licence to excavate.**

The Director-General may in his discretion approve or refuse any application for a licence to excavate:

Provided that no such licence shall be granted unless the Director General is satisfied, after such inquiry as he may deem it necessary to make-

- (a) that the owner of the land where the proposed excavation is to be made has consented to the excavation; and
- (b) that the proposed excavation will not cause any damage or inconvenience to persons residing in the vicinity of such land, or to any place used for religious purposes, or to any cemetery, school, water source or supply, irrigation or drainage works or public road, or that any such damage is likely to be caused adequate provision has been made by the applicant for the payment of compensation therefor; and
- (c) that the applicant is able to furnish security for the due observance by him of this Act or any rule made thereunder, and of and conditions subject to which the licence may be issued.

### **Section 12. Terms and conditions of licence.**

(1) A licence granted under section 11 shall be valid for such period (subject to the provision of section 13) and subject to such conditions as may be specified therein.

(2) In addition to any other conditions which may be either prescribed generally or specified in any particular case, every licence granted under section 11 shall be subject to the following condition:

- (a) the holder of the licence shall take all reasonable measures for the preservation of the antiquities discovered by him;
- (b) the holder of the licence shall carry out his excavations in a scientific manner and to the satisfaction of the Director-General;
- (c) the holder of the licence shall keep a record of all antiquities discovered in the course of the excavation;
- (d) the holder of the licence shall, within a reasonable time, deposit with the Director-General such photographs, casts squeezes or other reproductions of any antiquity apportioned to him in accordance with section 6 as the Director-General may require;
- (e) the holder of the licence shall furnish such plans and photographs of his excavations

as the Director-General may require.

(3) Such photograph, cast squeeze, reproduction or plan shall be held by the Director-General and where a museum exists in the State in which the antiquity was found one copy shall be deposited in such museum.

### **Section 13. Extension and cancellation of licence.**

(1) Any licence to excavate may, at the expiration of the period for which it was granted, be extended by the Director-General for such further periods as he shall deem fit.

(2) Any licence to excavate may, at any time before the expiration of the period for which it was granted, be cancelled by the Director-General and the holder thereof shall not be entitled to claim compensation for any loss or damage suffered or alleged to have been suffered by him by reason of such cancellation.

### **Section 14. Saving of private rights and immunity of Government.**

(1) Nothing contained in this Part shall be deemed to authorise the infringement of any private right or the contravention of any written law.

(2) Neither the Director-General, the Government nor the Government of any state shall incur any liability in respect of any loss sustained by any person or of any damage caused to any person in the course of or as a result of any excavation carried on under the authority of a licence granted under this Part, by reason merely of the grant of such licence.

### **Section 15. Declaration and schedule of ancient monuments and historical sites.**

(1) The Minister may by order declare any monument to be ancient monument and any site to be a historical site and may determine the limits of such monument or site:

Provided that if the monument or site is situated in any State, the concurrence of the State Authority is to be first obtained.

(2) The Director-General may, with the approval of the Minister, publish in the *Gazette* a schedule of ancient monument and historical sites together with the limits thereof and may from time to time, with the like approval, add to or amend such schedules.

### **Section 16. Acts prohibited in regard to ancient monument and historical sites.**

No person shall, without the permission in writing of the Director-General after consultation with the Minister, and except in accordance with such conditions as he may impose in granting such permission-

- (a) dig, excavate, build, plant trees, quarry, irrigate, burn lime or do similar work or deposit earth or refuse on or in the immediate neighbourhood of an ancient monument or a historical site included in the schedule published in accordance with section 15, as added to or amended from time to time, or establish or extend a cemetery on a historical site so included; or

- (b) demolish an ancient monument or disturb, obstruct, modify, mark, pull down or remove any such monument or any part thereof;
- (c) make alteration, additions or repairs to any ancient monument; or
- (d) erect buildings or walls abutting upon an ancient monument.

## **Section 17. Care of ancient monuments and historical sites.**

Where any ancient monument or historical site is on private property the Director-General may after consultation with the Government of the State in which the ancient monument or historical site is situated-

- (a) make arrangements with the owner or occupier thereof its preservation, inspection and maintenance and for such purposes make a contribution towards the cost of carrying out any work of repair or conservation which he deems necessary and which the owner or occupier may be willing to undertake:

Provided that where such a contribution towards the cost of carrying out such works is work is made, such works shall be carried out in accordance with such direction as the Director-General may give;

- (b) purchase or lease the site by private treaty or acquire the same in accordance with the provisions of any written law relating to the acquisition of land for a public purpose for the time being in force; or

- (c) in the case of an ancient monument, remove the whole or any part thereof making good any damage done to the site or to building thereon by such removal and paying compensation there for:

Provided that the amount of such compensation shall be fixed by agreement or in the case of dispute shall be submitted to the Minister whose decision shall be final.

## **Section 18. Inspection of ancient monuments and historical sites.**

- (1) The owner or occupier of an ancient monument or historical site shall at all reasonable times permit the Director-General or any person or officer authorised by him either generally or specially in that behalf to enter upon the site for inspection or to carry out any study or work necessary for the restoration, repair, alteration, maintenance or conservation thereof as to him may seem expedient or necessary:

Provided that the liability imposed by this section shall arise only if such owner or occupier have received not less than seven days' notice in writing of any proposed entry:

Provided further that if any person objects to such entry or to the execution of any such works on conscientious or religious ground such entry or work shall not be effected or executed except with the permission in writing of the Menteri Besar or Chief Minister of the State in which such monument or historical site is situated.

- (2) No such owner or occupier shall be entitled to claim compensation for any loss or damage



suffered or alleged to have been suffered by him by reason of the execution of such work or any part or such work in any case in which the owner or occupier has undertaken to do such work under section 17.

### **Section 19. Declaration of archaeological reserves.**

The State Authority or, in the case of the Federal Territory, the Minister, on the recommendation of the Director-General may by order declare any specified area to be an archaeological reserve for the purposes of this Act.

### **Section 20. Encroachments, etc. on archaeological reserve.**

No person shall, except under licence issued by the Director-General-

- (a) clear to break up for cultivation or cultivate any part of an archaeological reserve;
- (b) erect any building or structure on any such reserve;
- (c) fell or otherwise destroy any tree standing on any such reserve; or
- (d) otherwise encroach on any such reserve.

### **Section 21. Prohibition of export except on licence.**

(1) No person shall export any antiquity unless-

- (a) he has obtained a licence to export the same from the Director-General or that the antiquity was originally imported by him; and
- (b) he has declared the antiquity to a proper officer of customs at a customs airport or customs port.

(2) The Director-General shall not issue a licence if in his opinion the antiquity is or will be of lasting national importance or interest.

(3) An applicant for a licence for a licence to export any antiquity shall submit the description of such antiquity, shall declare the value thereof and furnish any other particulars in regard thereto which the Director-General may require and shall, if so required by the Director-General, deposit any such antiquity with the Director General for the purpose of inspection

(4) No licence to export an antiquity shall be issued to any person unless he proves to the satisfaction of the Director-General that he is the owner of such antiquity or that he is acting on behalf of and with the authority of the owner.

### **Section 22. Production of licence.**

A licence to export shall be produced by the holder to the Director-General or the proper officer of customs on demand.

### **Section 23. Prohibition of export of historical object.**



(1) Where a proper officer of customs or an officer authorised in writing by the Director-General has reason to believe that any object which is to be exported is a historical object he may detain such object and forthwith report such detention to the Director-General;

(2) If the Director-General is satisfied that the historical object is or will be of lasting national importance or interest he may prohibit the export thereof.

## **Section 24. Appeal.**

Where the issue of a licence to export an antiquity is refused on the grounds set out in section 21 (2) or where a historical object is prohibited from being exported under section 23 (2) any person aggrieved by such refusal or prohibition may appeal to the Minister within one month of receiving notice of such refusal.

## **Section 25. Acquisition of antiquity or historical object sought to be exported.**

(1) Where a licence to export any antiquity has been refused on the ground that such antiquity should be acquired on behalf of the Government or where a historical object is prohibited from being exported, the Director General shall pay to the owner thereof the reasonable compensation for such antiquity or historical object and thereupon the said owner shall deliver up the same to the Director-General who may dispose or deal with it in such manner as he deems fit.

(2) Where there is any dispute between the Director General and the owner as to the reasonable compensation for the antiquity or historical object such dispute shall be submitted to the Minister whose decision shall be final.

## **Section 26. Power of Director-General to inspect any antiquity and to request for information.**

(1) The Director-General or any officer authorised by him in writing for that purpose may at all reasonable times inspect any antiquity, or inspect any historical object which he has reason to believe is or will be of lasting national importance or interest, in the possession of any person; and it shall be the duty of every such person to permit such inspection and further to give to the Director-General or such officer all reasonable facilities to study such antiquity or historical object and to make drawings, photographs, squeezes or reproductions thereof by the making of casts or by any other means:

Provided that no such drawings, photographs, squeezes or reproductions shall be sold without the consent of the person in possession of the antiquity or historical object.

(2) For the purpose of subsection (1), the Director-General may in writing demand any person whom he believes to be in possession of the antiquity or historical object to produce such antiquity or historical object in his office.

(3) The Director-General or any officer authorised by him in writing for that purpose may in writing or orally require any person to supply him any information relating to anything which is or he believes to be an antiquity, historical object or any monument.

## **Section 27. Delegation of powers.**

The Director-General may in writing generally specially authorise the exercise, performance or discharge of any of his powers, duties or functions under this Act any regulations or rules made thereunder by any other officer.

## **Section 28. Penalties.**

(1) Any person who, being the finder of any antiquity or ancient monument fails to report the same or to deliver up the origin of the same, or wilfully makes a false report of such circumstances or such origin, commits an offence and shall be liable to imprisonment not exceeding one year or to a fine exceeding two thousand ringgit or to both.

(2) Any person who sells or otherwise disposes of any antiquity or historical object, contrary to the provisions of section 7 commits an offence and shall be liable to imprisonment not exceeding six months or to a fine not exceeding one thousand ringgit or to both.

(3) Any person, not being the holder of a licence to excavate granted under section 11 who wilfully or negligently digs for antiquity or demolishes or damage any ancient monument, whether above or below the ground, even though the acts are done upon land of which he is the owner, commits an offence and shall be liable to imprisonment not exceeding three months or to a fine not exceeding five hundred ringgit or to both.

(4) Any person who contravenes section 16 commits an offence and shall be liable to imprisonment not exceeding three months or to a fine not exceeding five hundred ringgit or to both.

(5). Any person who contravenes section 20 commits an offence and shall be liable to imprisonment not exceeding three month or to a fine not exceeding five hundred ringgit or to both.

(6) Any person who-

(a) not being the holder of a licence to export granted under section 21, exports or attempts to export any antiquity; or

(b) fails to declare any antiquity to proper officer of customs at the customs airport or costumes port as required under section 21;

commits an offence and shall be liable to imprisonment not exceeding six months or to a fine not exceeding five thousand ringgit or to both.

(7) Any person who exports or attempts to export any antiquity in respect of which a licence to export has been refused or exports or attempts to export any historical object which the Director-General has prohibited from being exported commits an offence and shall be liable to imprisonment not exceeding one year or to a fine not exceeding ten thousand ringgit or to both.

(8) Any person who fails to give reasonable facilities to the Director-General to inspect, study, make drawings, photographs, squeezes or other reproductions of any antiquity or historical object or to enter and carry out any necessary work for the restoration, repair, alteration, maintenance or conservation of any ancient monument or historical site, where the duty to give such facilities is imposed by this Act, or fails to comply with any demand to produce made under section 26 (2), commits an offence and shall be liable to a fine not exceeding five hundred ringgit.

(9) Any person who fails to supply any information required by the Director-General or any officer authorised by him in writing for that purpose in pursuance of the power conferred under section 26 (3) or supplies any information which he knows or has reason to believe to be false commits an offence and shall be liable to a fine not exceeding five hundred ringgit.

(10) Any person who maliciously or negligently destroys, injures, displaces, disturbs or disfigures any historical object in respect of which a notice under section 7 (1) has been given or which has been prohibited from being exported under section 23 (2) or any antiquity commits an offence and shall be liable to imprisonment not exceeding one year or to a fine not exceeding two thousand ringgit or to both.

(11) Any person who wilfully deceives or attempts to deceive or attempts to any public officer acting in the course of his duty by any description, statement or other indication as to the genuineness or age of any antiquity or historical object commits an offence and shall be liable to imprisonment not exceeding one year or to a fine not exceeding two thousand ringgit or to both.

## **Section 29. Prosecution.**

The Director-General and any public officer authorised in writing by the Director-General for that purpose shall have the power to prosecute any offence under this Act or any regulation made thereunder.

## **Section 30. Forfeiture of claims to and interest in antiquity or historical objects.**

(1) Any person who is convicted of any offence under this act in respect of any antiquity or historical object shall by virtue of such conviction forfeit all claim to or interest in the same or the value or thereof any reward in connection with the finding thereof, and in any such case the Magistrate shall order the antiquity or historical object to be delivered up to the Director-General; and where the Magistrate makes such order it shall be the duty of any person in whose possession the antiquity may be to deliver it accordingly.

(2) The Minister may, on appeal by any person aggrieved by an order of the Magistrate under subsection (1), order any antiquity or historical object forfeited under this section to be delivered to the owner or other person entitled there to or to be returned to the finder, as the case may be, upon such terms and conditions as he may deem fit.

(3) The appeal shall be in writing and shall be made not later than one month from the date of the order of the Magistrate.

## **Section 31. Authority to sell antiquities and historical objects.**

The Director-General may on behalf of the Government and if so requested by the Government of any State may on its behalf sell any antiquity or historical object which is the property of such Government.

## **Section 32. Loan of antiquities and historical objects.**

(1) The Director-General may make loans or exchanges of any antiquities or historical objects which are the property of the Government to or with learned societies or museums or with any expert or specialist and may authorise the export of the same for such purposes.

(2) Any agreement for a loan under subsection (1) shall contain adequate provisions for the preservation, insurance and, if the Director-General considers necessary, the return of the antiquities or historical objects.

### **Section 33. Dealers.**

No person shall deal in antiquities unless he is in possession of a dealer licence granted by the Director- General.

### **Section 34. Rules.**

The Minister may make rules for the purpose of carrying out or giving effect to the provisions of this Act, and, without prejudice to the generality of the foregoing, may make rules-

- (a) prescribing the conditions and restrictions (including the payment and amount of a fee) subject to which any licence or permit under this Act may be granted or issued;
- (b) prescribing the conditions and restrictions (including the payment and amount of a fee) subject to which members of the public may have access to any ancient monument on Federal or State land; and
- (c) prescribing a penalty of a fine not exceeding five hundred ringgit for the contravention or failure to comply with any of the provisions of any rules made under this section or with the restrictions or conditions of any licence or permit granted under any such rules.

### **Section 35. Repeal and saving.**

(1) The Antiquities and Treasure Trove Ordinance, 1957 [14/57] is, except in so far as it applies to treasure troves, hereby repealed.

(2) All subsidiary legislations made under the repealed Ordinance relating to matters other than treasure trove shall continue to remain in force repealed by rules made under this Act and all licences, permits and authorities granted under the repealed Ordinance shall remain valid until their expiration or unless they are suspended or revoked.